

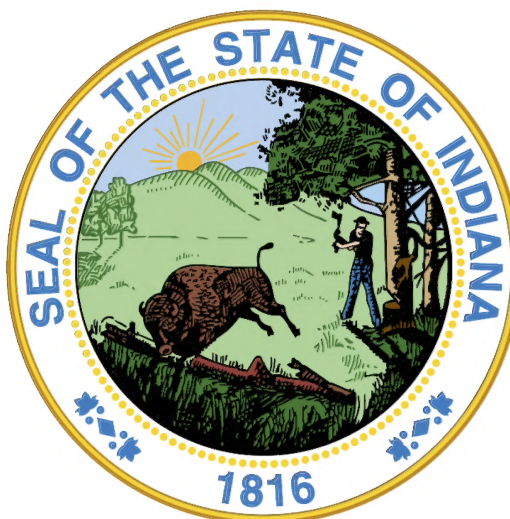
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Chief Justice Roberts

Georgia, et. al., Petitioners v. Public.Resource.Org, Inc.

590 U.S. ___, 140 S. Ct. 1498, 206 L. Ed. 2d 732



INDIANA PATTERN JURY INSTRUCTIONS

Civil

2021 Edition

Indiana Judges Association

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2021 Edition

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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6623
www.lexisnexis.com

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What’s New in the 2021 Edition

CHAPTER 100 PRELIMINARY INSTRUCTIONS

The comments to Instruction No. 325 were amended to add citation to the new case, *Whetstine v. Menard*, 161 N.E.3d 1274 (Ind. Ct. App. 2020).

The instruction defining foreseeable was amended throughout to track the holding of *Bolin v. Wingert*, 764 N.E.2d 201, 207–08 (Ind. 2002) by removing the requirement of a defendant’s knowledge of a specific injury.

A new instruction on respondeat superior—constructive knowledge of employer was added as Instruction Nos. 954, 1144, and 3529.

A new instruction on the requirement to wear a helmet on a motorcycle was added, Instruction No. 1322.

The Committee drafted new instructions for Chapter 1900’s section on premises liability—1912 Possessor of Land, 1928 Duty of Invitee, and 1930 Assumption Property is Reasonably Safe for Use. The comment was also amended for Instruction No. 1929.

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Preface

Jury Reform In Indiana

In 1997 the Judicial Administration Committee of the Judicial Conference of Indiana began conducting research on jury reform. At approximately the same time, the Indiana Supreme Court organized citizens, attorneys, and judges, forming the Citizens Commission for the Future of Indiana Courts. The Commission obtained grant funding to study the jury system and formed the Juries for the 21st Century Committee to collect data and information on jury procedures.

The recommendations of both the Judicial Administration Committee and the Citizens Commission resulted in new jury rules for Indiana effective on January 1, 2003, covering jury pool formation, selection, and management. The objectives of the new rules were to promote consistency in jury procedures throughout the state, to improve efficiency within the jury system, to require all qualified citizens to serve with few exceptions, to promote diversity in the jury pool and the trial jury, and to assist jurors in understanding the issues, evidence, and trial process.

To help local courts implement these new rules, Chief Justice Randall T. Shepard established the Jury Committee of the Judicial Conference of Indiana in 2002. The Jury Committee developed a standard orientation program for jurors pursuant to the new rules and continues to respond to questions from local courts and to recommend improvements to the jury system. In 2003, the Jury Committee worked with a local production company to produce a standard jury orientation video entitled “Indiana Jury Service: Duty, Honor, Privilege,” which is available to all Indiana courts at no cost and is also available to the public on the Internet at <http://www.in.gov/judiciary/juryduty/>. This video was updated in 2008.

The Jury Committee also worked in partnership with judicial and executive branch agencies on the state’s Jury Pool Project, which provides to local courts a jury master list containing information from both the Bureau of Motor Vehicles and state Department of Revenue. The first list was released in the fall of 2005, and the project team continues to improve the list based on local court feedback. This new master list is more inclusive of Indiana’s citizens than ever before, and has decreased the amount of undeliverable mail sent to prospective jurors. In 2006, the Indiana Supreme Court received a Special Merit Citation from the American Judicature Society and the Indiana Civil Liberties Union’s Sigmund Beck Award for this project.

The Next Step

After these incredible improvements in the ways that citizens are called to be jurors and their management when they get to the courthouse, the next logical step was to improve the information given to juries about the specifics of the trials in which they participate—the jury instructions. The responsibility for this falls under the purview of the Indiana Judges Association Instructions Committees. The Civil Instructions Committee reviewed research on legal language and juror comprehension, learning that disorganized and jargon-heavy instructions do an utterly inadequate job of informing jurors of what they are to do. Half of the jurors in one study, for example, thought that “preponderance of the evidence” meant a slow, careful pondering of the evidence.¹ In several other studies, jurors thought that proximate cause

¹ William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 Calif. L. Rev. 731,

Preface

meant “approximate cause.”² One Chicago judge reported that he presided over a trial in which the jury’s note asked whether proximate cause meant “it’s pretty close to the cause.”³ It was apparent that the language of the law, common and comfortable for lawyers and judges, was not getting the job done when the same language was used to communicate with lay people.

With encouragement from Chief Justice Shepard and support from LexisNexis, the Committee hired Elizabeth Francis, PhD, a Professor of English and Judicial Studies at the University of Nevada at Reno, as an expert to teach plain English principles. Professor Francis, who also teaches judicial writing courses at the National Judicial College, provided great assistance to the Committee on how to approach the rewriting of the Civil Instructions.

Plain English involves using the simplest, most straightforward way to express an idea to increase comprehension, compliance, and satisfaction with the jury process. The Committee focused on clearly identifying the parties, omitting unnecessary words, using active voice and understandable vocabulary, keeping sentences short, and organizing ideas in a logical sequence. The Committee attempted, however, to maintain the use of irreducible words (such as “liable”) and to avoid false economy by fully explaining important ideas, rather than giving them short shrift. Some new instructions use examples or illustrations to explain especially difficult concepts.

In addition to teaching plain language principles, Professor Francis prepared a preliminary draft of each of the instructions in the Indiana Pattern Jury Instructions (Civil). The Committee began revising the drafts in November of 2007, and completed its revisions in March of 2010. The Committee worked as a group on each instruction in 15 two-day meetings during that 28-month period. We hope that lawyers, judges, and jurors will find these instructions to be a much clearer, understandable statement of the law of Indiana and what jurors are suppose to do with it.

Appreciation

The names of the Committee members are listed on page xxix. They come from communities both large and small in all parts of Indiana. Each member made an enormous, unselfish contribution to the work of the Committee. While in projects like this there can never be total agreement on every point considered, the debates were always cordial, respectful, and full of good humor. It was an honor and privilege for me to serve with such an outstanding group of individuals, all of whom gave freely of themselves to see this project to a conclusion.

In addition, our work would not have been possible without the leadership of the Justices of the Indiana Supreme Court, and in particular Chief Justice Randall T. Shepard. Projects like this don’t happen without a vision that we can always do things better and leadership from the top to nurture that vision into reality. It was the Court that started us down the path of jury reform thirteen years ago. We hope that these new civil instructions are the icing on the cake of the endeavor the Supreme Court began.

A final but no less enthusiastic and sincere word of thanks goes to the Indiana Judicial Center and to Julie McDonald, the Center staff attorney assigned to this committee. She went above

741 (1981) (citing O’Reilly, *Why Some Juries Fail*, 41 D.C.B.J. 69 (1974)).

² Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979); see also Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L.J. 456, 468 (1962) (“proximate cause” is frequently misinterpreted to mean “probable” or “approximate cause”).

³ James D. Wascher, *The Importance of Juries: The Long March Toward Plain English Jury Instructions*, 19 Chicago Bar Ass’n Record 50, 50–51 (2005).

Preface

and beyond the call of duty in assisting us, admirably and efficiently fulfilling the role of scribe, researcher, and cheerleader as we labored these many months to complete our work. We all are indebted to her for a job well done.

Respectfully,
John R. Pera
Judge, Lake Superior Court
Chair, Civil Instructions Committee
June 25, 2010

2021 Civil Instructions Committee

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Amanda R. Wishin
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Words, phrases, and sentences that appear in brackets are alternatives or additions to instructions, to be used when applicable to the particular case on trial. To avoid confusion, parentheses are used to denote brackets inside of brackets. Judges and attorneys using these instructions should, therefore, follow these guidelines:

- (1) Choose between or among words in brackets if there are no spaces between the brackets.
- (2) Replace words in brackets with their proper names or descriptions if the words in brackets are in italics.
- (3) Based on the evidence or circumstances in each case, choose whether to give phrases or sentences in brackets if the brackets are separated by spaces or paragraph breaks.

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Derivation Table

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731	11.06, 11.63, 11.70, 11.71, 11.72	Wrongful Death—Damages Recoverable by the Estate’s Personal Representative—No Surviving Spouse, Dependent Children or Dependent Next of Kin
733	11.09, 11.70, 11.71, 11.72	Wrongful Death of Unmarried Adult with Non-Dependent Parents or Children
735	11.05, 11.81	Wrongful Death—Death of Child
737	11.100	Punitive Damages
739	11.101	Punitive Damages—Terms—Definitions
741	11.105	Measure of Punitive Damages
743	11.107	Reprehensibility Analysis
745	11.103	Punitive Damages—Out-of-State Conduct
901	1.03	Issues for Trial; Burden of Proof
903	9.03	Elements; Burden of Proof
905	9.06	Burden of Proof for Plaintiff’s Fault in a Comparative Fault Case
907	6.01	Comparative Fault—Definition
909	5.01	Negligence—Definition
911	5.03	Reasonable Care—Definition
913	6.15	Willful or Wanton Misconduct—Definition

Derivation Table

New Instruction	Former Instruction	New Title
914	new	Gross Negligence—Definition
915	6.17	Reckless Conduct—Definition
917	5.06	Responsible Cause (Proximate Cause)—Definition
918	new	Foreseeable—Defined
919	5.09	Intervention of Outside Cause
921	6.11, 9.17	Incurred Risk/Assumed Risk—Comparative Fault Only
923	6.05	Nonparty
925	new	Defendant Takes Plaintiff as He Finds Him
926	new	Preexisting and Post-Incident Conditions
927	6.07	Comparative Fault—Children
929	6.09	Fault of a Parent
931	6.19	Sudden Emergency
932	new	Rescue
933	5.31	Intoxication—No Excuse or Justification
935	6.13	Duty to Minimize (Mitigate)—Comparative Fault
937	17.01	Violation of Statutory Duty as Fault or Negligence
939	17.03	Excuse from Statutory Violation
941	6.03(A)	Comparative Fault—Apportionment—One Plaintiff/One Defendant
943	6.03(B)	Comparative Fault—Apportionment—One Plaintiff/Two Defendants
944(A)	new	Mixed Comparative Fault and Common Law Defendants—If All Parties Agree—Judge Calculates Judgment Against Each Defendant
944(B)	new	Mixed Comparative Fault and Common Law Defendants
945	6.03(C)	Comparative Fault—Apportionment—Plaintiff and Spouse (Consortium Claim)
947	6.03(D)	Comparative Fault—Apportionment—Two Plaintiffs Both Claimed at Fault
949	6.03(E)	Comparative Fault—Apportionment—Two Plaintiffs with One Claimed at Fault

Derivation Table

New Instruction	Former Instruction	New Title
951	6.03(F)	Comparative Fault— Apportionment—Two Plaintiffs with One Claimed at Fault and Two Defendants Treated as One
953	new	Respondeat Superior—Vicarious Liability
955	new	Negligence of Party Providing Dangerous Item for Use by An- other
957	new	Negligence of Party Providing Dangerous Item for a Business Purpose of the Provider
959	new	Dram Shop—Issues for Trial; Bur- den of Proof
961	new	Sporting Event Injuries—Co- Participants, Spectators, and/or Third Persons
1101	1.03	Issues for Trial; Burden of Proof
1103	9.03	Elements; Burden of Proof
1105	5.07, 9.05	Contributory Negligence— Definition; Burden of Proof
1107	5.01	Negligence—Definition
1109	5.03	Reasonable Care—Definition
1111	5.04	Willful and Wanton Misconduct— Definition
1113	5.29	Contributory Negligence—Not a Defense to Willful and Wanton Misconduct
1115	5.05	Reckless—Definition
1117	5.06	Responsible Cause (Proximate Cause)—Definition
1118	new	Foreseeable—Defined
1119	5.09	Intervention of Outside Cause
1121	new	Defendant Takes Plaintiff as He Finds Him
1122	new	Preexisting and Post-Incident Con- ditions
1123	5.39	Concurring Acts of Negligence of Two or More Persons: Common Law Negligence Cases Only
1125	5.35	Last Clear Chance: Common Law Negligence Only
1127	5.41, 9.18	Incurred Risk/Assumed Risk— Common Law Negligence Only
1129	5.25	Negligence or Contributory Negligence—Children
1131	5.27	Negligence of Parent

Derivation Table

New Instruction	Former Instruction	New Title
1133	5.33	Sudden Emergency
1134	new	Rescue
1135	5.31	Intoxication—No Excuse or Justification
1137	11.120	Duty to Minimize (Mitigate) Damages—Common Law Negligence Cases
1139	17.01	Violation of Statutory Duty as Fault or Negligence
1141	17.03	Excuse from Statutory Violation
1142(A)	new	Mixed Comparative Fault and Common Law Defendants—If All Parties Agree—Judge Calculates Judgment Against Each Defendant
1142(B)	new	Mixed Comparative Fault and Common Law Defendants
1143	new	Respondeat Superior—Vicarious Liability
1145	new	Negligence of Party Providing Dangerous Item for Use by Another
1147	new	Negligence of Party Providing Dangerous Item for a Business Purpose of the Provider
1201	new	Excessive Force—Non-Incarcerated Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Elements
1203	new	Excessive Force—Non-Incarcerated Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Scope of Force
1205	new	Excessive Force—Non-Incarcerated Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Reasonableness of Force
1207	new	Excessive Force—Non-Incarcerated Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Two or More Defendants
1209	new	Excessive Force—Non-Incarcerated Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Failure to Intervene
1301	19.01	Duty of Driver and/or Pedestrian to Be Careful
1303	19.02, 19.03	Proper Lookout
1305	19.04	Passenger's Duty of Care

Derivation Table

New Instruction	Former Instruction	New Title
1307	19.06	Assumption Others Will Use Due Care
1309	9.15, 19.11, 19.13	Automobile Guest (Relatives and Hitchhikers)—Liability
1311	15.29, 19.19	Joint Enterprise—Defined
1313	19.31	Duty of Driver of Emergency Vehicle
1315	19.33	Duty of Others Upon Approach of Emergency Vehicle
1317	19.35	Emergency Call
1319	19.37	People/Vehicles at Work on Highway
1321	19.42	Train Operator—Duty of Care
1323	21.01	Carrier of Passengers—Definition
1325	21.03	Passenger—Definition
1327	21.05	Duty to Passenger Generally
1329	21.07	Duty to Protect Passenger from Injury by Passengers, Third Persons, and Employees
1331	21.09	Duty to Protect Passengers from Intentional Harm by Employees
1333	21.11	Duty to Disabled, Infirm, or Intoxicated Person or to Child
1335	21.13	Duty to Provide Place to Wait, Board, and Alight
1337	21.15	Passenger Complying with Rules—Carrier Liable for Expulsion
1501	1.03	Issues for Trial; Burden of Proof
1503	9.03	Elements; Burden of Proof
1505	5.01	Negligence—Definition
1507	5.03	Reasonable Care—Definition
1509	5.07, 9.05	Contributory Negligence—Definition; Burden of Proof
1511	23.01	Medical Negligence—Health Care Provider
1513	5.06	Responsible Cause (Proximate Cause)—Definition
1514	new	Foreseeable—Defined
1515	23.10	Duty of Medical Specialist
1517	23.11	Duty to Refer to Specialist
1519	23.02	Joint Duty of Health Care Providers Qualified Under the Medical Malpractice Act
1521	23.03	Delegation of Duties—Foreign Objects

Derivation Table

New Instruction	Former Instruction	New Title
1523	23.06	Right to Rely upon Health Care Provider
1525	23.05	Choice of Treatment Modalities
1527	23.07	Informed Consent
1529	23.08, 23.09	Informed Consent—Elements—Burden of Proof
1531	23.25	Consent Required; Express and Implied Consent Defined
1533	23.26	Incapacity to Consent
1535	23.27	Consent Not Required—Emergency Operation
1537	23.28	Consent Not Required—Additional Surgery
1539	23.12	Expert Testimony Required
1541	23.13	Medical Review Panel—Weight
1543	23.14	Res Ipsa Loquitur
1545	23.15	Hospital Liability
1547	23.16	Duty of Hospital Employees
1549	23.17	Contributory Negligence—Duty to Provide Accurate Information
1551	23.18	Contributory Negligence—Duty to Follow Instructions
1553	23.19	Duty to Follow Instructions After Treatment—Mitigation of Damages
1555	23.31	Loss of Chance—Elimination of a Probability of Recovery
1556	new	Loss of Chance—Increased Risk of Future Harm
1557	23.32	Lost Chance—Reduced Life Expectancy
1559	23.20	Statute of Limitations—General
1561	23.21, 23.22	Statute of Limitations—Doctrine of Fraudulent Concealment
1563	23.23	Statute of Limitations—Continuing Wrong—Course of Conduct
1565	23.24	Statute of Limitations—Failure to Diagnose
1567	23.29	Physicians—Battery
1569	23.30	Good Samaritan
1571(A)	new	Mixed Comparative Fault and Common Law Defendants—If All Parties Agree—Judge Calculates Judgment Against Each Defendant
1571(B)	new	Mixed Comparative Fault and Common Law Defendants
1701	1.03	Issues for Trial; Burden of Proof

Derivation Table

New Instruction	Former Instruction	New Title
1703	23.33	Duty of the Attorney
1705	23.34	Standard of Care—Degree of Knowledge
1707	23.38	Legal Negligence—Elements
1709	9.06	Burden of Proof for Plaintiff’s Fault in a Comparative Fault Case
1711	6.01	Comparative Fault—Definition
1713	5.06	Responsible Cause (Proximate Cause)—Definition
1714	new	Foreseeable—Defined
1715	23.36	Delegation of Duty
1717	23.37	Standard of Care—Expert Opinion
1901	1.03	Issues for Trial; Burden of Proof
1903	9.06	Burden of Proof for Plaintiff’s Fault in a Comparative Fault Case
1905	6.01	Comparative Fault—Definition
1907	5.03	Reasonable Care—Definition
1909	5.06	Responsible Cause (Proximate Cause)—Definition
1910	new	Foreseeable—Defined
1911	25.00	Status and Duty in General
1913	25.01	Trespasser
1915	25.03	Duty to Trespasser
1917	new	Trespasser—Elements and Burden of Proof
1919	25.05	Licensee
1921	25.07	Duty to Licensee
1923	new	Licensee—Elements and Burden of Proof
1925	25.09	Invitee
1927	25.10	Invitation—Express or Implied
1929	25.11	Duty to Invitee
1931	25.12	Invitee—Elements and Burden of Proof
1933	9.19, 25.13	Attractive Nuisance
1935	25.14	Attractive Nuisance—Burden of Proof
1937	25.15	Duty of [Owner’s] [Occupier’s] Real Estate Agent to Prospective Buyer
1939	25.31	Control of Common Areas
1941	25.33	Hidden Defects—Common Law
1943	25.51	Highways, Streets, and Sidewalks—Duty of Governmental Entity

Derivation Table

New Instruction	Former Instruction	New Title
1945	25.71(A)	Duty in General—Plaintiff on Premises of Non-profit Religious Organizations with Actual or Implied Permission
1947	25.71(B)	Duty in General—Plaintiff on Premises of Non-profit Religious Organization Without Actual or Implied Permission
1949	25.73	Duty—Non-profit Religious Organizations—Childcare Services
1951	25.75	Permission or Consent—Express or Implied—Non-profit Religious Organizations
1953	21.51	Domestic Animals—General Duty
1955	21.53	Domestic Animals—Known to be Dangerous
1957	21.55	Inherently Dangerous Animals
2101	1.03	Issues for Trial; Burden of Proof
2103	7.03	Product Liability Against Manufacturer—Elements—Burden of Proof
2105	5.06	Responsible Cause (Proximate Cause)—Definition
2106	new	Foreseeable—Defined
2107	7.01(D)	Product—Definition
2109	7.01(A)	User or Consumer—Definition
2111	7.01(B)	Physical Harm—Definition
2113	7.01(C)	Seller—Definition
2115	7.01(F)	Manufacturer—Definition
2117	7.01(E)	Unreasonably Dangerous—Definition
2119	7.01(G)	Seller as “Manufacturer”—Definition
2121	7.02(A)	Defective Products—Defective Condition
2125	7.04, 7.04(B)	Reasonable Care Not a Defense
2127	5.03	Reasonable Care—Definition
2129	7.04, 7.04(A)	Lack of Privity Not a Defense
2131	7.05(A)	Defense—Misuse of Product
2133	7.05(B)	Defense—Known Defect and Danger
2135	7.05(C)	Defense—Modification/Alteration of Product
2151	new	Crashworthiness—Products Liability Against Manufacturer (Strict Liability)—Issues for Trial; Burden of Proof

Derivation Table

New Instruction	Former Instruction	New Title
2153	new	Crashworthiness—Products Liability Against Manufacturer (Strict Liability)—Elements—Burden of Proof
2301	7.31	Negligence Theory Transition Instruction
2303	1.03	Issues for Trial; Burden of Proof
2305	7.04(C)	Product Negligence—Elements; Burden of Proof
2307	6.01	Comparative Fault—Definition
2309	5.01	Negligence—Definition
2311	5.03	Reasonable Care—Definition
2313	5.06	Responsible Cause (Proximate Cause)—Definition
2314	new	Foreseeable—Defined
2315	7.01(D)	Product—Definition
2316(A)	7.02(A)	Defective Products—Defective Condition
2316(B)	7.02(B)	Defective Product—Warnings/Instructions
2317	7.01(A)	User or Consumer—Definition
2319	7.01(B)	Physical Harm—Definition
2321	7.01(C)	Seller—Definition
2323	7.01(F)	Manufacturer—Definition
2325	7.01(E)	Unreasonably Dangerous—Definition
2327	7.02(C)	Product Safe for Reasonably Expected Handling/Product Incapable of Being Made Safe—Not Defective
2329	7.05(D)	Products in Conformity with State of the Art or in Compliance with Applicable Codes—Not Defective (Rebuttable Presumption)
2331	7.35(A)	Defense—No Duty to Warn for Open and Obvious Dangers
2333	7.05(A)	Defense—Misuse of Product
2335	7.05(B)	Defense—Known Defect and Danger
2337	7.05(C)	Defense—Modification/Alteration of Product
2351	new	Crashworthiness—Negligence Theory Transition Instruction
2353	new	Crashworthiness—Products Liability (Negligence)—Issues for Trial; Burden of Proof

Derivation Table

New Instruction	Former Instruction	New Title
2355	new	Crashworthiness—Products Liability (Negligence)—Elements; Burden of Proof
2501	1.03	Issues for Trial; Burden of Proof
2503	7.11	Breach of Warranty—Elements
2505	5.06	Responsible Cause (Proximate Cause)—Definition
2506	new	Foreseeable—Defined
2507	7.13, 7.16, 7.17, 7.18, 7.20(A), 7.20(B)	Definitions for Breach of Warranty Claims
2509	7.12	Express Warranties by Statement, Promise, Description or Sample
2511	7.14	Warranty Not Created by Mere Opinion or Commendation
2513	new	Types of Implied Warranties
2515	7.15	Implied Warranty of Merchantability
2517	7.19, 7.20(C)	Implied Warranties Arising from Course of Dealing or Use of Trade
2519	7.21	Implied Warranty of Fitness for a Particular Purpose
2521	7.22	Exclusion or Modification of Warranties
2523	7.23	Cumulation and Conflict of Warranties Express or Implied
2525	7.24	Third Party Beneficiaries of Warranties
2701	35.01	Nature of Plaintiff's Claim; Burden of Proof
2703	35.03	Defamation—Definition
2705	35.05	Libel—Definition
2707	35.07	Slander—Definition
2709	35.09	Defamatory Per Se—Definition
2711	35.11	Defamatory Per Quod—Definition
2713	5.03	Reasonable Care—Definition
2714	new	Responsible Cause (Proximate Cause)—Definition
2715	35.13	Public Official or Public Figure Plaintiff or Matter of Public Concern/Media Defendant/Presumed Damages
2717	35.15	Public Official or Public Figure Plaintiff or Matter of Public Concern/Media Defendant/Without Presumed Damages

Derivation Table

New Instruction	Former Instruction	New Title
2719	35.17	Public Official or Public Figure Plaintiff or Matter of Public Concern/Non-Media Defendant/Presumed Damages
2721	35.19	Public Official or Public Figure Plaintiff or Matter of Public Concern/Non-Media Defendant/Without Presumed Damages
2723	35.21	Private Figure Plaintiff/No Public Concern/Media Defendant/ Presumed Damages
2725	35.23	Private Figure Plaintiff/No Public Concern/Media Defendant/Without Presumed Damages
2727	35.25	Private Figure Plaintiff/No Public Concern/Non-Media Defendant/Presumed Damages
2729	35.27	Private Figure Plaintiff/No Public Concern/Non-Media Defendant/Without Presumed Damages
2731	35.31	Ill Will
2733	35.32	Punitive Damages
2735	35.33	Truth as a Defense
2737	35.35, 35.37	Qualified Privilege
2739	35.39	Slander of Title
2901	11.111	Negligent Infliction of Emotional Distress—Elements
2903	11.112	Negligent Infliction of Emotional Distress—Bystander or Relative Bystander—Elements
2905	11.110, 31.95	Intentional Infliction of Emotional Distress—Definition
2907	11.110, 31.97	Intentional Infliction of Emotional Distress—Elements
2909	31.99	Extreme and Outrageous Conduct—Definition
2911	11.28	Emotional Distress Damages
3101	1.03	Issues for Trial; Burden of Proof
3103	31.61	Fraud—Definition
3105	31.63	Fraud—Elements—Burden of Proof
3107	31.65	Fraud—Promise of Future Events
3109	31.67	Fraud—Reliance
3111	31.69, 31.71	Constructive Fraud—Definition and Elements—Burden of Proof

Derivation Table

New Instruction	Former Instruction	New Title
3113	31.31	False Imprisonment—False Arrest—Definition
3115	31.33	False Imprisonment or False Arrest by Law Enforcement Officer—Elements
3117	31.07	Liability of Employer for Intentional Torts Committed by Employee
3119	31.35	Arrest by Citizen—Elements
3121	11.28	Emotional Distress Damages
3123	31.80	Unfair Competition—Definition
3125	31.81	Unfair Competition—Passing Off—Elements—Burden of Proof
3127	31.83	Unfair Competition—Predatory Pricing; Relevant Cost Standard
3129	31.85	Unfair Competition Based on Predatory Pricing—Elements—Burden of Proof
3131	31.87	Wrongful Interference with Contractual Relations—Elements—Burden of Proof
3133	31.89	Wrongful Interference with a Business Relationship—Elements—Burden of Proof
3135	31.91	Factors Used in Determining Absence of Justification
3137	31.01	Assault—Definition
3139	31.05, new	Assault—Elements
3141	31.03	Battery—Definition
3143	31.05, new	Battery—Elements
3145	31.07	Liability of Employer for Intentional Torts Committed by Employee
3147	31.09(A)	Self-Defense (Person)
3149	31.09(C)	Self-Defense (Property)
3151	31.09(B)	Self-Defense (Dwelling) (Curtilage) (Occupied Motor Vehicle)
3153	31.09(D)	Curtilage—Definition
3155	11.28	Emotional Distress Damages
3156	new	Sporting Event Injuries—Co-Participants, Spectators, and/or Third Persons
3157	31.41, 31.43	Malicious Prosecution—Definition—Elements—Burden of Proof
3159	31.47	Probable Cause—Definition
3161	31.45	Malicious Act—Definition

Derivation Table

New Instruction	Former Instruction	New Title
3163	31.49, 31.50	Defense—Advice of Counsel— Initiation of Civil Proceeding
3165	31.51, 31.53	Abuse of Process—Definition— Elements—Burden of Proof
3173	new	Wrongful (Retaliatory) Discharge
3175	new	Employment Law--Employment at Will
3177	new	Exception to At Will Employment--Statutorily Con- ferred Right/Retaliatory Discharge
3179	new	Exception to Employment at Will---Employee's Refusal to Commit an Illegal Act
3181	new	Constructive Discharge—Elements
3182	new	Intentional Torts—Employment Law—Constructive Discharge— Medical Restriction
3183	new	Intentional Torts—Employment Law—Constructive Discharge— Failure to Exhaust
3184 former 3183	new	Retaliatory Discharge—Elements
3185	new	Burden Shifting/Pretext/Honest Belief
3187	new	Damages
3189	new	Mitigation for Damages
3190	new	Intentional Torts—Employment Law—Punitive Damages
3301	1.03	Issues for Trial; Burden of Proof
3303	33.01	Contract—Definition
3305	33.03	“Something of Value” (Consider- ation)
3307	33.19	Breach of Contract
3309	33.21, 33.25	Breach of Contract—Elements— Burden of Proof
3311	5.06	Responsible Cause (Proximate Cause)—Definition
3312	new	Foreseeable—Defined
3313	33.23	Measure of Damages
3315	33.05	Unilateral Contract
3317	33.06	Contract Implied in Law— Elements—Burden of Proof
3319	33.07	Contract Implied in Fact
3321	34.05	Promissory Estoppel
3323	33.09	Substantial Performance
3325	33.11	Performance Prevented by Party
3327	33.13	Impossibility of Performance

Derivation Table

New Instruction	Former Instruction	New Title
3329	33.15	Time of Performance
3331	34.11	Accord and Satisfaction
3333	34.01	Mutual Mistake of Fact
3335	34.07	Undue Influence—Operation of Law
3337	34.09	Undue Influence—Finding of Relationship
3339	34.13	Waiver
3341	34.15	Duress
3501	15.11	Partnership—Definition
3503	15.13, 15.15	Partnership—Partnership Bound by Partner's Wrongful Act; Nature of Partner's Liability
3505	15.17	Agency—Corporate Officers or Employees
3507	15.01	Principal, Agent—Defined
3509	15.03	General Agent—Definition
3511	15.05	Special Agent—Definition
3513	15.19	Agent—Express Authority
3515	15.21	Agent—Implied Authority
3517	15.07	Apparent Authority—Definition
3519	15.09	Independent Contractor as Agent
3521	15.23	Principal Sued but Not Agent—Agency Existence is Not Contested
3523	15.25	Principal and Agent Both Sued—Agency Existence is Not Contested
3525	15.27	Principal and Agent Both Sued—Agency Denied—Acting in Scope of Authority Denied
3527	new	Respondeat Superior—Vicarious Liability
3701	29.01	Oath of Appraisers
3703	29.03	Instructions to Appraisers
3705	29.05	Appraisers' Report
3707	29.13/29.101	Constitutional Provision
3709	29.15/29.103	Just Compensation—Defined
3711	new	Residue of the Property—Defined
3713	29.07/29.111	Issues—Preliminary Instruction
3715	29.09/29.113	Burden of Proof
3717	29.11/29.201	Damages—Date of Taking
3719	29.17/29.203	Damages—Statute
3721	29.18/29.205	Juror Worksheet
3723	29.33/29.105	Fair Market Value—Defined
3725	29.21/29.207	Damages—Highest and Best Use

Derivation Table

New Instruction	Former Instruction	New Title
3727	29.27/29.209	Damages—Loss of Access
3729	29.29/29.211	Damages to Residue
3731	29.31/29.213	Benefits to Residue
3901	27.01	Action to Contest or Resist Pro- bate of a Will—Issues for Trial— Burdens of Proof
3903	27.05	Will—Definition
3905	27.13	Right of Disposition
3907	27.09	Testamentary Capacity—Definition
3909	27.07	Requirements of Due Execution— Will Other than Nuncupative Will
3911	27.11	Undue Influence—Definition
3913	34.15	Duress
3915	27.15	Validity of Will and Codicil
3917	27.17	Requirements of Due Execution— Nuncupative (Oral) Will
3919	5.06	Responsible Cause (Proximate Cause)—Definition
3920	new	Foreseeable—Defined
5001(A)	37.03(A) new FORM	Comparative Fault—One Plaintiff/One Defendant
5001(B)	37.03(A) FORM A	Comparative Fault—One Plaintiff/One Defendant
5001(C)	37.03(A) FORM B	Comparative Fault—One Plaintiff/One Defendant
5003(A)	37.03(B) new FORM	Comparative Fault—One Plaintiff/Two Defendants
5003(B)	37.03(B) FORM A	Comparative Fault—One Plaintiff/Two Defendants
5003(C)	37.03(B) FORM B	Comparative Fault—One Plaintiff/Two Defendants
5004	new	Comparative Fault— Apportionment—One Plaintiff/Two Defendants (One Common Law Defendant)—If All Parties Agree Judge Calculates Each Defendant's Liability
5005(A)	37.03(C) new FORM	Comparative Fault—Plaintiff and Spouse (Consortium Claim)
5005(B)	37.03(C) FORM A	Comparative Fault—Plaintiff and Spouse (Consortium Claim)
5005(C)	37.03(C) FORM B	Comparative Fault—Plaintiff and Spouse (Consortium Claim)
5007(A)	37.03(D) new FORM	Comparative Fault—Two Plaintiffs Both Claimed at Fault
5007(B1)	37.03(D) FORM A1	Comparative Fault—Two Plaintiffs Both Claimed at Fault

Derivation Table

New Instruction	Former Instruction	New Title
5007(B2)	37.03(D) FORM A2	Comparative Fault—Two Plaintiffs Both Claimed at Fault
5007(C1)	37.03(D) FORM B1	Comparative Fault—Two Plaintiffs Both Claimed at Fault
5007(C2)	37.03(D) FORM B2	Comparative Fault—Two Plaintiffs Both Claimed at Fault
5009(A)	37.03(E) new FORM	Comparative Fault—Two Plaintiffs with One Claimed at Fault
5009(B)	37.03(E) FORM A2	Comparative Fault—Two Plaintiffs with One Claimed at Fault
5009(C1)	37.03(E) FORM B1	Comparative Fault—Two Plaintiffs with One Claimed at Fault
5009(C2)	37.03(E) FORM B2	Comparative Fault—Two Plaintiffs with One Claimed at Fault
5011(A)	37.03(F) new FORM	Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One
5011(B)	37.03(F) FORM A2	Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One
5011(C1)	37.03(F) FORM B1	Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One
5011(C2)	37.03(F) FORM B2	Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One
5012	new	Comparative Fault—For Plaintiff with Punitive Damages
5013	37.05	Common Law Negligence—For Plaintiff
5015	37.07	Common Law Negligence—For Plaintiff with Punitive Damages
5017	37.09	Common Law Negligence—For Defendant
5019	37.11	Common Law Negligence—For Plaintiff Against All Defendants
5020	new	Verdict Forms—Common Law Negligence—For Plaintiff Against All Defendants—Separate and Distinct Harms
5021	37.13	Common Law Negligence—For Plaintiff Against Some Defendants
5022	new	Verdict Forms—Common Law Negligence—For Plaintiff Against Some, But Not All, Defendants—Separate and Distinct Harms
5023	37.15	Common Law Negligence—For Defendants Against Plaintiff

Derivation Table

New Instruction	Former Instruction	New Title
5025	37.17	Common Law Negligence—Counterclaim— For Plaintiff
5027	37.19	Common Law Negligence—Counterclaim— For Counterclaimant
5029	37.21	Common Law Negligence—Counterclaim— Against Plaintiff and Counter- claimant
5031	37.23, 37.25, & new	Common Law Negligence— Complaint and Counterclaim
5033	29.51, 37.37	Verdict in Eminent Domain Pro- ceedings
5035	37.43	Will Invalid—Probated or Unpro- bated
5037	37.45	Will Valid—Probated or Unpro- bated
5039	37.47	Codicil Invalid—Probated or Un- probated
5041	37.49	Codicil Valid—Probated or Unpro- bated
5043(A)	new	Wrongful Death—Surviving De- pendent Children, Surviving Spouse, Surviving Dependent Next of Kin—Comparative Fault
5043(B)	new	Wrongful Death—Surviving De- pendent Children, Surviving Spouse, Surviving Dependent Next of Kin—Comparative Fault
5043(C)	new	Wrongful Death—Surviving De- pendent Children, Surviving Spouse, Surviving Dependent Next of Kin—Comparative Fault
5045	new	Wrongful Death—Surviving De- pendent Children, Surviving Spouse, Surviving Dependent Next of Kin—Common Law Negligence Cases—Common Law Negligence
5046(A)	new	Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin— Comparative Fault
5046(B)	new	Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin— Comparative Fault

Derivation Table

New Instruction	Former Instruction	New Title
5046(C)	new	Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Comparative Fault
5046(D)	new	Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Common Law Negligence
5046(E)	new	Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Common Law Negligence
5047(A)	37.51 new	Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Comparative Fault
5047(B)	37.51 FORM A	Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Comparative Fault
5047(C)	37.51 FORM B	Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Comparative Fault
5049	37.53	Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Common Law Negligence
5051(A)	new	Loss of Chance—Elimination of a Probability of Recovery
5051(B)	new	Loss of Chance—Elimination of a Probability of Recovery
	Former Instruction	(Old Title)
removed	1.15	(Final Preliminary Instruction)
removed	3.09	(Impeachment of Witness—Proof of Bad Reputation for Truth and Veracity for Bad Moral Character)
removed	5.37	(Mere Accident)
removed	5.43	(Assumption of Risk—Employer—Employee—Ordinary and Extraordinary Risks in General)
removed	7.32	(Duty to Provide Product Reasonably Safe for Its Intended Use)
removed	7.33	(No Duty to Produce Accident Proof Products)
removed	7.35(B)	(Liability for Hidden Defects)

Derivation Table

New Instruction	Former Instruction	New Title
removed	7.36	(Seller Holding Self Out as Manufacturer)
removed	7.38	(Duty to Inspect for Dangers)
removed	7.39	(Duty of Care in Providing Products for Doing Work)
removed	9.07	(Counterclaim)
removed	9.09	(Cross-Complaint—Third-Party Complaint—Multiple Parties)
removed	11.02	(Comparative Fault—Injury to Person or Property)
removed	11.50	(To Plaintiff for Spouse’s or Child’s Medical Expenses)
removed	13.11	(Counterclaim)
removed	13.13	(Loss of Consortium)
removed	13.15	(Loss of Consortium—Elements—Burden of Proof)
removed	19.05	(Pedestrian, Motorist—Statutory Violations)
removed	19.41	(Duty of Driver Crossing Tracks)
removed	19.43	(Speed—Trains)
removed	19.45	(Statutory Violation—Duty to Signal)
removed	21.57	(Statutory Violations)
removed	23.04	(Implied Warranty of Capacity and Ability)
removed	23.35	(Implied Warranty of Capacity and Ability)
removed	29.23	(Damages—Direct and Certain—Not Remote)
removed	29.25	(Damages—Jury to Determine)
removed	34.03	(Laches)
removed	37.01	(General Verdict)
removed	37.27	(Replevin—Verdict for Plaintiff)
removed	37.31	(Replevin—Part of Property for Plaintiff and Part for Defendant)
removed	37.33	(Ejectment—Possession and Damages)
removed	37.35	(Ejectment—Damages Only After Expiration of Possessory Right)
removed	37.39	(Partition—Verdict for Plaintiff and Defendants)
removed	37.41	(Partition—Verdict for Defendants)

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
1.01	101	Duty of Jurors—Admonishment
1.03	109, 505, 901, 1101, 1501, 1701, 1901, 2101, 2303, 2501, 3101, 3301	Issues for Trial; Burden of Proof
1.05	111, 509	Greater Weight of the Evidence (Preponderance of the Evidence)
1.06	113, 511	Clear and Convincing Evidence
1.07	319, 533	Insurance Not to Be Considered
1.09	115, 515	Credibility of Witnesses—Weighing Evidence
1.10	119	Juror Note-Taking
1.11	117	Exhibits/Court Rulings
1.12	121	Juror Questions—Procedure
1.13	123	Conduct of Trial
1.15	removed	(Final Preliminary Instruction)
1.17	103	Personal Knowledge of a Juror
3.01	115, 515	Credibility of Witnesses—Weighing Evidence
3.03	527	Evidence Admitted for Limited Purposes
3.05	517	Impeachment of Witness—Prior Inconsistent Acts, Statements, Testimony
3.07	519	Impeachment of Witness—Proof of Conviction of Crime
3.09	removed	(Impeachment of Witness—Proof of Bad Reputation for Truth and Veracity for Bad Moral Character)
3.11	535	Failure to Produce Evidence (Spoliation)
3.13	105	Law to the Court, Facts to the Jury
3.15	529	Inadmissible Evidence
3.16	319, 533	Insurance Not to Be Considered
3.17	543	Jury Deliberations
3.19	545	Jury Management
3.31	547	Duty of Alternate Juror
3.33	549	Inconsistent Jury Verdicts
4.01	307, 521	[Opinion] [Expert] [Skilled] Witness

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
4.02	305, 513	Direct Evidence & Circumstantial Evidence
4.03	309, 523	Agreed/Stipulated Facts
4.04	311, 525	Depositions
4.05	315	Jury View
4.06	313	Judicially Noticed Facts
4.07	317	Privileges
5.01	909, 1107, 1505, 2309	Negligence—Definition
5.03	911, 1109, 1507, 1907, 2127, 2311, 2713	Reasonable Care—Definition
5.04	1111	Willful and Wanton Misconduct— Definition
5.05	1115	Reckless—Definition
5.06	301, 917, 1117, 1513, 1713, 1909, 2105, 2313, 2505, 3311, 3919	Responsible Cause (Proximate Cause)—Definition
5.07	1105, 1509	Contributory Negligence— Definition; Burden of Proof
5.09	303, 919, 1119	Intervening Cause
5.25	1129	Negligence or Contributory Negligence—Children
5.27	1131	Negligence of Parent
5.29	1113	Contributory Negligence—Not a Defense to Willful and Wanton Misconduct
5.31	933, 1135	Intoxication—No Excuse or Justi- fication
5.33	1133	Sudden Emergency
5.35	1125	Last Clear Chance: Common Law Negligence Only
5.37	removed	(Mere Accident)
5.39	1123	Concurring Acts of Negligence of Two or More Persons: Common Law Negligence Cases Only
5.41	1127	Incurred Risk/Assumed Risk— Common Law Negligence Only
5.43	removed	(Assumption of Risk— Employer—Employee—Ordinary and Extraordinary Risks in Gen- eral)
6.01	907, 1711, 1905, 2307	Comparative Fault—Definition
6.03(A)	941	Comparative Fault— Apportionment—One Plaintiff/One Defendant

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
6.03(B)	943	Comparative Fault— Apportionment—One Plaintiff/Two Defendants
6.03(C)	945	Comparative Fault— Apportionment—Plaintiff and Spouse (Consortium Claim)
6.03(D)	947	Comparative Fault— Apportionment—Two Plaintiffs Both Claimed at Fault
6.03(E)	949	Comparative Fault— Apportionment—Two Plaintiffs with One Claimed at Fault
6.03(F)	951	Comparative Fault— Apportionment—Two Plaintiffs with One Claimed at Fault and Two Defendants Treated as One Nonparty
6.05	923	Comparative Fault—Children
6.07	927	Fault of a Parent
6.09	929	Incurred Risk/Assumed Risk— Comparative Fault Only
6.11	921	Duty to Minimize (Mitigate)— Comparative Fault
6.13	935	Willful or Wanton Misconduct— Definition
6.15	913	Reckless Conduct—Definition
6.17	915	Sudden Emergency
6.19	931	User or Consumer—Definition
7.01(A)	2109, 2317	Physical Harm—Definition
7.01(B)	2111, 2319	Seller—Definition
7.01(C)	2113, 2321	Product—Definition
7.01(D)	2107, 2315	Unreasonably Dangerous— Definition
7.01(E)	2117, 2325	Manufacturer—Definition
7.01(F)	2115, 2323	Seller as “Manufacturer”— Definition
7.01(G)	2119	Defective Products—Defective Condition
7.02(A)	2121, 2316(A)	Defective Product— Warnings/Instructions
7.02(B)	2316(B)	Product Safe for Reasonably Ex- pected Handling/Product Incapable of Being Made Safe—Not Defec- tive
7.02(C)	2327	

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
7.03	2103	Product Liability Against Manufacturer—Elements—Burden of Proof
7.04	2125, 2129	Reasonable Care/Lack of Privity Not a Defense
7.04(A)	2129	Lack of Privity Not a Defense
7.04(B)	2125	Reasonable Care Not a Defense
7.04(C)	2305	Product Negligence—Elements; Burden of Proof
7.05(A)	2131, 2333	Defense—Misuse of Product
7.05(B)	2133, 2335	Defense—Known Defect and Danger
7.05(C)	2135, 2337	Defense—Modification/Alteration of Product
7.05(D)	2329	Products in Conformity with State of the Art or in Compliance with Applicable Codes—Not Defective (Rebuttable Presumption)
7.11	2503	Breach of Warranty—Elements
7.12	2509	Express Warranties by Statement, Promise, Description or Sample
7.13	2507	Definitions for Breach of Warranty Claims
7.14	2511	Warranty Not Created by Mere Opinion or Commendation
7.15	2515	Implied Warranty of Merchantability
7.16	2507	Definitions for Breach of Warranty Claims
7.17	2507	Definitions for Breach of Warranty Claims
7.18	2507	Definitions for Breach of Warranty Claims
7.19	2517	Implied Warranties Arising from Course of Dealing or Use of Trade
7.20(A)	2507	Definitions for Breach of Warranty Claims
7.20(B)	2507	Definitions for Breach of Warranty Claims
7.20(C)	2517	Implied Warranties Arising from Course of Dealing or Use of Trade
7.21	2519	Implied Warranty of Fitness for a Particular Purpose
7.22	2521	Exclusion or Modification of Warranties

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
7.23	2523	Cumulation and Conflict of Warranties Express or Implied
7.24	2525	Third Party Beneficiaries of Warranties
7.31	2301	Negligence Theory Transition Instruction
7.32	removed	(Duty to Provide Product Reasonably Safe for Its Intended Use)
7.33	removed	(No Duty to Produce Accident Proof Products)
7.35(A)	2331	Defense—No Duty to Warn for Open and Obvious Dangers
7.35(B)	removed	(Liability for Hidden Defects)
7.36	removed	(Seller Holding Self Out as Manufacturer)
7.38	removed	(Duty to Inspect for Dangers)
7.39	removed	(Duty of Care in Providing Products for Doing Work)
9.01	111, 509	Greater Weight of the Evidence (Preponderance of the Evidence)
9.02	113, 511	Clear and Convincing Evidence
9.03	507, 903, 1103, 1503	Elements; Burden of Proof
9.05	1105, 1509	Contributory Negligence—Definition; Burden of Proof
9.06	905, 1709, 1903	Burden of Proof for Plaintiff's Fault in a Comparative Fault Case
9.07	removed	(Counterclaim)
9.09	removed	(Cross-Complaint—Third-Party Complaint—Multiple Parties)
9.13	325	Res Ipsa Loquitur
9.15	1309	Automobile Guest (Relatives and Hitchhikers)—Liability
9.17	921	Incurred Risk/Assumed Risk—Comparative Fault Only
9.18	1127	Incurred Risk/Assumed Risk—Common Law Negligence Only
9.19	1933	Attractive Nuisance
11.01	703	General Elements of Damages
11.02	removed	(Comparative Fault—Injury to Person or Property)
11.03	717	Real Property—General Rule
11.04	725, 727, 729	Wrongful Death—Surviving Spouse, Surviving Dependent Children or Dependent Next of Kin

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
11.05	735	Wrongful Death—Death of Child
11.06	731	Wrongful Death—Damages Recoverable by the Estate's Personal Representative—No Surviving Spouse, Dependent Children or Dependent Next of Kin
11.07	531	Collateral Source Evidence
11.08	715	Tax Consequences of Verdict
11.09	733	Wrongful Death of Unmarried Adult with Non-Dependent Parents or Children
11.10	537, 707	Judicial Notice of Mortality Tables
11.20	703	Nature and Extent of Injury
11.21	703	Injury—Permanent or Temporary
11.22	703	Pain and Suffering
11.23	703	Loss of Earnings or Profits— Impairment of Earning Capacity—Adult
11.24	709	Impairment of Earning Capacity—Child Plaintiff
11.25	703	Medical and Hospital Expenses
11.26	703	Aggravation of Previous Injury or Disease
11.27	703	Disfigurement or Deformity
11.28	2911, 3121, 3155	Emotional Distress Damages
11.40	721	Personal Property—Complete Destruction or Loss
11.41	723	Personal Property—Partial Destruction
11.50	removed	(To Plaintiff for Spouse's or Child's Medical Expenses)
11.51	705	Loss of Consortium—Loss of Spouse's Services
11.52	713	Parent Claim for Loss of Child's Services
11.60	725, 727, 729	Age, Health, Life Expectancy
11.61	725, 727, 729	Occupation and Earning Capacity
11.62	725, 727, 729	Value of Future Support
11.63	725, 727, 729, 731	Loss of Care, Love, and Affection
11.70	725, 727, 729, 731, 733	Health Care Expenses
11.71	725, 727, 729, 731, 733	Funeral Expenses
11.72	725, 727, 729, 731, 733	Costs of Administration and Prosecution
11.81	735	Wrongful Death—Death of Child

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
11.90	711	Effects of Inflation—Damages to Be Incurred in Future
11.100	737	Punitive Damages
11.101	739	Punitive Damages—Terms— Definitions
11.103	745	Punitive Damages—Out-of-State Conduct
11.105	741	Measure of Punitive Damages
11.107	743	Reprehensibility Analysis
11.110	2905, 2907	Intentional Infliction of Emotional Distress
11.111	2901	Negligent Infliction of Emotional Distress—Elements
11.112	2903	Negligent Infliction of Emotional Distress—Bystander or Relative Bystander—Elements
11.120	1137	Duty to Minimize (Mitigate) Damages—Common Law Negli- gence Cases
13.01	539	Consolidated Actions—Two or More Plaintiffs
13.05	541	Two or More Defendants
13.07	321	Assess Damages Separately—Two or More Plaintiffs
13.09	323	Joint and Several Liability—Non- Comparative Fault Cases
13.11	removed	(Counterclaim)
13.13	removed	(Loss of Consortium)
13.15	removed	(Loss of Consortium—Elements— Burden of Proof)
15.01	3507	Principal, Agent—Defined
15.03	3509	General Agent—Definition
15.05	3511	Special Agent—Definition
15.07	3517	Apparent Authority—Definition
15.09	3519	Independent Contractor as Agent
15.11	3501	Partnership—Definition
15.13	3503	Partnership—Partnership Bound by Partner's Wrongful Act
15.15	3503	Partnership—Nature of Partner's Liability
15.17	3505	Agency—Corporate Officers or Employees
15.19	3513	Agent—Express Authority
15.21	3515	Agent—Implied Authority

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
15.23	3521	Principal Sued but Not Agent—Agency Existence is Not Contested
15.25	3523	Principal and Agent Both Sued—Agency Existence is Not Contested
15.27	3525	Principal and Agent Both Sued—Agency Denied—Acting in Scope of Authority Denied
15.29	1311	Joint Enterprise—Defined
17.01	327, 937, 1139	Violation of Statutory Duty as Fault or Negligence
17.03	329, 939, 1141	Excuse from Statutory Violation
19.01	1301	Duty of Driver and/or Pedestrian to Be Careful
19.02	1303	Proper Lookout
19.03	1303	Proper Lookout
19.04	1305	Passenger's Duty of Care
19.05	removed	(Pedestrian, Motorist—Statutory Violations)
19.06	1307	Assumption Others Will Use Due Care
19.11	1309	Automobile Guest (Relatives and Hitchhikers)—Liability
19.13	1309	Automobile Guest (Relatives and Hitchhikers)—Liability
19.19	1311	Joint Enterprise—Defined
19.31	1313	Duty of Driver of Emergency Vehicle
19.33	1315	Duty of Others Upon Approach of Emergency Vehicle
19.35	1317	Emergency Call
19.37	1319	People/Vehicles at Work on Highway
19.41	removed	(Duty of Driver Crossing Tracks)
19.42	1321	Train Operator—Duty of Care
19.43	removed	(Speed—Trains)
19.45	removed	(Statutory Violation—Duty to Signal)
21.01	1323	Carrier of Passengers—Definition
21.03	1325	Passenger—Definition
21.05	1327	Duty to Passenger Generally
21.07	1329	Duty to Protect Passenger from Injury by Passengers, Third Persons, and Employees

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
21.09	1331	Duty to Protect Passengers from Intentional Harm by Employees
21.11	1333	Duty to Disabled, Infirm, or Intoxicated Person or to Child
21.13	1335	Duty to Provide Place to Wait, Board, and Alight
21.15	1337	Passenger Complying with Rules—Carrier Liable for Expulsion
21.51	1953	Domestic Animals—General Duty
21.53	1955	Domestic Animals—Known to be Dangerous
21.55	1957	Inherently Dangerous Animals
21.57	removed	(Statutory Violations)
23.01	1511	Medical Negligence—Health Care Provider
23.02	1519	Joint Duty of Health Care Providers Qualified Under the Medical Malpractice Act
23.03	1521	Delegation of Duties—Foreign Objects
23.04	removed	(Implied Warranty of Capacity and Ability)
23.05	1525	Choice of Treatment Modalities
23.06	1523	Right to Rely upon Health Care Provider
23.07	1527	Informed Consent
23.08	1529	Informed Consent—Elements—Burden of Proof
23.09	1529	Informed Consent—Elements—Burden of Proof
23.10	1515	Duty of Medical Specialist
23.11	1517	Duty to Refer to Specialist
23.12	1539	Expert Testimony Required
23.13	1541	Medical Review Panel—Weight
23.14	1543	Res Ipsa Loquitur
23.15	1545	Hospital Liability
23.16	1547	Duty of Hospital Employees
23.17	1549	Contributory Negligence—Duty to Provide Accurate Information
23.18	1551	Contributory Negligence—Duty to Follow Instructions
23.19	1553	Duty to Follow Instructions After Treatment—Mitigation of Damages

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
23.20	1559	Statute of Limitations—General
23.21	1561	Statute of Limitations—Doctrine of Fraudulent Concealment
23.22	1561	Statute of Limitations—Doctrine of Fraudulent Concealment
23.23	1563	Statute of Limitations—Continuing Wrong—Course of Conduct
23.24	1565	Statute of Limitations—Failure to Diagnose
23.25	1531	Consent Required; Express and Implied Consent Defined
23.26	1533	Incapacity to Consent
23.27	1535	Consent Not Required— Emergency Operation
23.28	1537	Consent Not Required—Additional Surgery
23.29	1567	Physicians—Battery
23.30	1569	Good Samaritan
23.31	1555	Increased Risk of Harm
23.32	1557	Lost Chance—Reduced Life Ex- pectancy
23.33	1703	Duty of the Attorney
23.34	1705	Standard of Care—Degree of Knowledge
23.35	removed	(Implied Warranty of Capacity and Ability)
23.36	1715	Delegation of Duty
23.37	1717	Standard of Care—Expert Opinion
23.38	1707	Legal Negligence—Elements
25.00	1911	Status and Duty in General
25.01	1913	Trespasser
25.03	1915	Duty to Trespasser
25.05	1919	Licensee
25.07	1921	Duty to Licensee
25.09	1925	Invitee
25.10	1927	Invitation—Express or Implied
25.11	1929	Duty to Invitee
25.12	1931	Invitee—Elements and Burden of Proof
25.13	1933	Attractive Nuisance
25.14	1935	Attractive Nuisance—Burden of Proof

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
25.15	1937	Duty of [Owner's] [Occupier's] Real Estate Agent to Prospective Buyer
25.31	1939	Control of Common Areas
25.33	1941	Hidden Defects—Common Law
25.51	1943	Highways, Streets, and Sidewalks—Duty of Governmental Entity
25.71(A)	1945	Duty in General—Plaintiff on Premises of Non-profit Religious Organizations with Actual or Im- plied Permission
25.71(B)	1947	Duty in General—Plaintiff on Premises of Non-profit Religious Organization Without Actual or Implied Permission
25.73	1949	Duty—Non-profit Religious Organizations—Childcare Services
25.75	1951	Permission or Consent—Express or Implied—Non-profit Religious Organizations
27.01	3901	Action to Contest or Resist Pro- bate of a Will—Issues for Trial— Burdens of Proof
27.05	3903	Will—Definition
27.07	3909	Requirements of Due Execution— Will Other than Nuncupative Will
27.09	3907	Testamentary Capacity—Definition
27.11	3911	Undue Influence—Definition
27.13	3905	Right of Disposition
27.15	3915	Validity of Will and Codicil
27.17	3917	Requirements of Due Execution— Nuncupative (Oral) Will
29.01	3701	Oath of Appraisers
29.03	3703	Instructions to Appraisers
29.05	3705	Appraisers' Report
29.07/29.111	3713	Issues—Preliminary Instruction
29.09/29.113	3715	Burden of Proof
29.11/29.201	3717	Damages—Date of Taking
29.13/29.101	3707	Constitutional Provision
29.15/29.103	3709	Just Compensation—Defined
29.17/29.203	3719	Damages—Statute
29.18/29.205	3721	Juror Worksheet
29.21/29.207	3725	Damages—Highest and Best Use

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
29.23	removed	(Damages—Direct and Certain—Not Remote)
29.25	removed	(Damages—Jury to Determine)
29.27/29.209	3727	Damages—Loss of Access
29.29/29.211	3729	Damages to Residue
29.31/29.213	3731	Benefits to Residue
29.33/29.105	3723	Fair Market Value—Defined
29.51	5033	Verdict in Eminent Domain Proceedings
31.01	3137	Assault—Definition
31.03	3141	Battery—Definition
31.05	3139, 3143	Liability for [Assault] [Battery]
31.07	3117, 3145	Liability of Employer for Intentional Torts Committed by Employee
31.09(A)	3147	Self-Defense (Person)
31.09(B)	3151	Self-Defense (Dwelling) (Curtilage) (Occupied Motor Vehicle)
31.09(C)	3149	Self-Defense (Property)
31.09(D)	3153	Curtilage—Definition
31.31	3113	False Imprisonment—False Arrest—Definition
31.33	3115	False Imprisonment or False Arrest by Law Enforcement Officer—Elements
31.35	3119	Arrest by Citizen—Elements
31.41	3157	Malicious Prosecution—Definition—Elements—Burden of Proof
31.43	3157	Malicious Prosecution—Definition—Elements—Burden of Proof
31.45	3161	Malicious Act—Definition
31.47	3159	Probable Cause—Definition
31.49	3163	Defense—Advice of Counsel—Initiation of Civil Proceeding
31.50	3163	Defense—Advice of Counsel—Initiation of Civil Proceeding
31.51	3165	Abuse of Process—Definition—Elements—Burden of Proof
31.53	3165	Abuse of Process—Definition—Elements—Burden of Proof
31.61	3103	Fraud—Definition
31.63	3105	Fraud—Elements—Burden of Proof

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
31.65	3107	Fraud—Promise of Future Events
31.67	3109	Fraud—Reliance
31.69	3111	Constructive Fraud—Definition and Elements—Burden of Proof
31.71	3111	Constructive Fraud—Definition and Elements—Burden of Proof
31.80	3123	Unfair Competition—Definition
31.81	3125	Unfair Competition—Passing Off—Elements—Burden of Proof
31.83	3127	Unfair Competition—Predatory Pricing; Relevant Cost Standard
31.85	3129	Unfair Competition Based on Predatory Pricing—Elements—Burden of Proof
31.87	3131	Wrongful Interference with Contractual Relations—Elements—Burden of Proof
31.89	3133	Wrongful Interference with a Business Relationship—Elements—Burden of Proof
31.91	3135	Factors Used in Determining Absence of Justification
31.95	2905	Intentional Infliction of Emotional Distress—Definition
31.97	2907	Intentional Infliction of Emotional Distress—Elements
31.99	2909	Extreme and Outrageous Conduct—Definition
33.01	3303	Contract—Definition
33.03	3305	“Something of Value” (Consideration)
33.05	3315	Unilateral Contract
33.06	3317	Contract Implied in Law—Elements—Burden of Proof
33.07	3319	Contract Implied in Fact
33.09	3323	Substantial Performance
33.11	3325	Performance Prevented by Party
33.13	3327	Impossibility of Performance
33.15	3329	Time of Performance
33.19	3307	Breach of Contract
33.21	3309	Breach of Contract—Elements—Burden of Proof
33.23	3313	Measure of Damages
33.25	3309	Breach of Contract—Elements—Burden of Proof

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
34.01	3333	Mutual Mistake of Fact
34.03	removed	(Laches)
34.05	3321	Promissory Estoppel
34.07	3335	Undue Influence—Operation of Law
34.09	3337	Undue Influence—Finding of Re- lationship
34.11	3331	Accord and Satisfaction
34.13	3339	Waiver
34.15	3341, 3913	Duress
35.01	2701	Nature of Plaintiff's Claim; Bur- den of Proof
35.03	2703	Defamation—Definition
35.05	2705	Libel—Definition
35.07	2707	Slander—Definition
35.09	2709	Defamatory Per Se—Definition
35.11	2711	Defamatory Per Quod—Definition
35.13	2715	Public Official or Public Figure Plaintiff or Matter of Public Concern/Media Defendant/Presumed Damages
35.15	2717	Public Official or Public Figure Plaintiff or Matter of Public Concern/Media Defendant/Without Presumed Damages
35.17	2719	Public Official or Public Figure Plaintiff or Matter of Public Concern/Non-Media Defendant/Presumed Damages
35.19	2721	Public Official or Public Figure Plaintiff or Matter of Public Concern/Non-Media Defendant/Without Presumed Damages
35.21	2723	Private Figure Plaintiff/No Public Concern/Media Defendant/ Pre- sumed Damages
35.23	2725	Private Figure Plaintiff/No Public Concern/Media Defendant/Without Presumed Damages
35.25	2727	Private Figure Plaintiff/No Public Concern/Non-Media Defendant/Presumed Damages

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
35.27	2729	Private Figure Plaintiff/No Public Concern/Non-Media Defendant/Without Presumed Damages
35.31	2731	Ill Will
35.32	2733	Punitive Damages
35.33	2735	Truth as a Defense
35.35	2737	Qualified Privilege
35.37	2737	Qualified Privilege
35.39	2739	Slander of Title
37.01	removed	(General Verdict)
37.03(A) FORM A	5001(B)	Comparative Fault—One Plaintiff/One Defendant
37.03(A) FORM B	5001(C)	Comparative Fault—One Plaintiff/One Defendant
37.03(A) new FORM	5001(A)	Comparative Fault—One Plaintiff/One Defendant
37.03(B) FORM A	5003(B)	Comparative Fault—One Plaintiff/Two Defendants
37.03(B) FORM B	5003(C)	Comparative Fault—One Plaintiff/Two Defendants
37.03(B) new FORM	5003(A)	Comparative Fault—One Plaintiff/Two Defendants
37.03(C) FORM A	5005(B)	Comparative Fault—Plaintiff and Spouse (Consortium Claim)
37.03(C) FORM B	5005(C)	Comparative Fault—Plaintiff and Spouse (Consortium Claim)
37.03(C) new FORM	5005(A)	Comparative Fault—Plaintiff and Spouse (Consortium Claim)
37.03(D) FORM A1	5007(B1)	Comparative Fault—Two Plaintiffs Both Claimed at Fault
37.03(D) FORM A2	5007(B2)	Comparative Fault—Two Plaintiffs Both Claimed at Fault
37.03(D) FORM B1	5007(C1)	Comparative Fault—Two Plaintiffs Both Claimed at Fault
37.03(D) FORM B2	5007(C2)	Comparative Fault—Two Plaintiffs Both Claimed at Fault
37.03(D) new FORM	5007(A)	Comparative Fault—Two Plaintiffs Both Claimed at Fault
37.03(E) FORM A2	5009(B)	Comparative Fault—Two Plaintiffs with One Claimed at Fault
37.03(E) FORM B1	5009(C1)	Comparative Fault—Two Plaintiffs with One Claimed at Fault
37.03(E) FORM B2	5009(C2)	Comparative Fault—Two Plaintiffs with One Claimed at Fault

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
37.03(E) new FORM	5009(A)	Comparative Fault—Two Plaintiffs with One Claimed at Fault
37.03(F) FORM A2	5011(B)	Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One
37.03(F) FORM B1	5011(C1)	Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One
37.03(F) FORM B2	5011(C2)	Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One
37.03(F) new FORM	5011(A)	Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One
37.05	5013	Common Law Negligence—For Plaintiff
37.07	5015	Common Law Negligence—For Plaintiff with Punitive Damages
37.09	5017	Common Law Negligence—For Defendant
37.11	5019	Common Law Negligence—For Plaintiff Against All Defendants
37.13	5021	Common Law Negligence—For Plaintiff Against Some Defendants
37.15	5023	Common Law Negligence—For Defendants Against Plaintiff
37.17	5025	Common Law Negligence—Counterclaim—For Plaintiff
37.19	5027	Common Law Negligence—Counterclaim—For Counterclaimant
37.21	5029	Common Law Negligence—Counterclaim—Against Plaintiff and Counterclaimant
37.23	5031	Common Law Negligence—Complaint and Counterclaim
37.25	5031	Common Law Negligence—Complaint and Counterclaim
37.27	removed	(Replevin—Verdict for Plaintiff)
37.31	removed	(Replevin—Part of Property for Plaintiff and Part for Defendant)
37.33	removed	(Ejectment—Possession and Damages)
37.35	removed	(Ejectment—Damages Only After Expiration of Possessory Right)

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
37.37	5033	Verdict in Eminent Domain Proceedings
37.39	removed	(Partition—Verdict for Plaintiff and Defendants)
37.41	removed	(Partition—Verdict for Defendants)
37.43	5035	Will Invalid—Probated or Unprobated
37.45	5037	Will Valid—Probated or Unprobated
37.47	5039	Codicil Invalid—Probated or Unprobated
37.49	5041	Codicil Valid—Probated or Unprobated
37.51 FORM A	5047(B)	Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Comparative Fault
37.51 FORM B	5047(C)	Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Comparative Fault
37.51 new	5047(A)	Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Comparative Fault
37.53	5049	Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Common Law Negligence
new	107	Instructions Considered as a Whole
new	302	Foreseeable—Defined
new	501	Introduction to the Court’s Final Instructions
new	502	Sympathy, Bias, Prejudice
new	503	Instructions Considered as a Whole
new	544	Technology Used to Present Exhibits at Trial
new	701	Damages—Guess or Speculation
new	704	Pain and Suffering
new	716	Loss of Chance Damages—Increased Risk of Future Harm or Reduced Chance for a Better Result

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
new	719	Damage to Real Property Due to Environmental Contamination
new	914	Gross Negligence—Definition
new	918	Foreseeable—Defined
new	925	Defendant Takes Plaintiff as He Finds Him
new	926	Preexisting and Post-Incident Conditions
new	932	Rescue
new	944(A)	Mixed Comparative Fault and Common Law Defendants—If All Parties Agree—Judge Calculates Judgment Against Each Defendant
new	944(B)	Mixed Comparative Fault and Common Law Defendants
new	953	Respondeat Superior—Vicarious Liability
new	955	Negligence of Party Providing Dangerous Item for Use by Another
new	957	Negligence of Party Providing Dangerous Item for a Business Purpose of the Provider
new	959	Dram Shop—Issues for Trial; Burden of Proof
new	961	Sporting Event Injuries—Co-Participants, Spectators, and/or Third Persons
new	1118	Foreseeable—Defined
new	1121	Defendant Takes Plaintiff as He Finds Him
new	1122	Preexisting and Post-Incident Conditions
new	1134	Rescue
new	1142(A)	Mixed Comparative Fault and Common Law Defendants—If All Parties Agree—Judge Calculates Judgment Against Each Defendant
new	1142(B)	Mixed Comparative Fault and Common Law Defendants
new	1143	Respondeat Superior—Vicarious Liability
new	1145	Negligence of Party Providing Dangerous Item for Use by Another

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
new	1147	Negligence of Party Providing Dangerous Item for a Business Purpose of the Provider
new	1201	Excessive Force—Non-Incarcerated Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Elements
new	1203	Excessive Force—Non-Incarcerated Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Scope of Force
new	1205	Excessive Force—Non-Incarcerated Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Reasonableness of Force
new	1207	Excessive Force—Non-Incarcerated Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Two or More Defendants
new	1209	Excessive Force—Non-Incarcerated Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Failure to Intervene
new	1514	Foreseeable—Defined
new	1556	Loss of Chance—Increased Risk of Future Harm
new	1571(A)	Mixed Comparative Fault and Common Law Defendants—If All Parties Agree—Judge Calculates Judgment Against Each Defendant
new	1571(B)	Mixed Comparative Fault and Common Law Defendants
new	1714	Foreseeable—Defined
new	1910	Foreseeable—Defined
new	1917	Trespasser—Elements and Burden of Proof
new	1923	Licensee—Elements and Burden of Proof
new	2106	Foreseeable—Defined
new	2151	Crashworthiness—Products Liability Against Manufacturer (Strict Liability)—Issues for Trial; Burden of Proof

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
new	2153	Crashworthiness—Products Liability Against Manufacturer (Strict Liability)—Elements—Burden of Proof
new	2314	Foreseeable—Defined
new	2351	Crashworthiness—Negligence Theory Transition Instruction
new	2353	Crashworthiness—Products Liability (Negligence)—Issues for Trial; Burden of Proof
new	2355	Crashworthiness—Products Liability (Negligence)—Elements; Burden of Proof
new	2506	Foreseeable—Defined
new	2513	Types of Implied Warranties
new	2714	Responsible Cause (Proximate Cause)—Definition
new	3139	Assault—Elements
new	3143	Battery—Elements
new	3156	Sporting Event Injuries—Co-Participants, Spectators, and/or Third Persons
new	3173	Wrongful (Retaliatory) Discharge
new	3175	Employment Law--Employment at Will
new	3177	Exception to at Will Employment--Statutorily Conferred Right/Retaliatory Discharge
new	3179	Exception to Employment at Will--Employee's Refusal to Commit an Illegal Act
new	3181	Constructive Discharge—Elements
new	3182	Intentional Torts—Employment Law—Constructive Discharge—Medical Restriction
new	3183	Intentional Torts—Employment Law—Constructive Discharge—Failure to Exhaust
new	3184	Retaliatory Discharge—Elements (former 3183)
new	3185	Burden Shifting/Pretext/Honest Belief
new	3187	Damages
new	3189	Mitigation of Damages

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
new	3190	Intentional Torts—Employment Law—Punitive Damages
new	3312	Foreseeable—Defined
new	3527	Respondeat Superior—Vicarious Liability
new	3711	Residue of the Property—Defined
new	3920	Foreseeable—Defined
new	5004	Comparative Fault— Apportionment—One Plaintiff/Two Defendants (One Common Law Defendant)—If All Parties Agree Judge Calculates Each Defendant’s Liability
new	5012	Comparative Fault—For Plaintiff with Punitive Damages
new	5020	Verdict Forms—Common Law Negligence—For Plaintiff Against All Defendants—Separate and Distinct Harms
new	5022	Verdict Forms—Common Law Negligence—For Plaintiff Against Some, But Not All, Defendants— Separate and Distinct Harms
new	5031	Common Law Negligence— Complaint and Counterclaim
new	5043(A)	Wrongful Death—Surviving De- pendent Children, Surviving Spouse, Surviving Dependent Next of Kin—Comparative Fault
new	5043(B)	Wrongful Death—Surviving De- pendent Children, Surviving Spouse, Surviving Dependent Next of Kin—Comparative Fault
new	5043(C)	Wrongful Death—Surviving De- pendent Children, Surviving Spouse, Surviving Dependent Next of Kin—Comparative Fault
new	5045	Wrongful Death—Surviving De- pendent Children, Surviving Spouse, Surviving Dependent Next of Kin—Common Law Negligence Cases—Common Law Negligence
new	5046(A)	Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin— Comparative Fault

Disposition Table

Former Instruction	New Instruction	New Title (If Instruction Was Removed, the Former Title is in Parentheses)
new	5046(B)	Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Comparative Fault
new	5046(C)	Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Comparative Fault
new	5046(D)	Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Common Law Negligence
new	5046(E)	Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Common Law Negligence
new	5051(A)	Loss of Chance—Elimination of a Probability of Recovery
new	5051(B)	Loss of Chance—Elimination of a Probability of Recovery

CHAPTER 100

PRELIMINARY INSTRUCTIONS

SYNOPSIS

Introduction

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Introduction

Effective January 1, 2003, the Indiana Supreme Court adopted Jury Rules for Indiana trial courts governing jury assembly, selection, and management. Under these rules, the trial court is required to give each juror the written preliminary instructions while the court reads them. (The trial court must do the same with final instructions.) Ind. Jury Rules 20(c), 26.

Indiana Jury Rule 20 requires preliminary instructions on the issues for trial, applicable burdens of proof, the credibility of witnesses, the manner of weighing testimony, juror notetaking, a juror's personal knowledge about the case, the order in which the case will proceed, juror questions, and discussion of the evidence only when all are present. (Indiana Trial Rule 51(A) also requires preliminary instructions on the first four items in the Jury Rule 20 list.)

In addition, the trial court may authorize the use of juror trial books to aid the jurors in performing their duties; juror trial books may contain all given instructions, information regarding the anticipated trial schedule, witness lists, and copies of admitted exhibits. Ind. Jury Rule 23.

Indiana Jury Rule 20 and Ind. Trial Rule 51 require that a trial judge in a civil case give all the instructions in this chapter, except for Instruction Nos. 105, 107, and 117, which the Committee

recommends giving in every case. The Court should give 111 or 113, or both, depending on the burden(s) of proof at issue in the case.

The General Instructions chapter contains other instructions that may be used with these preliminaries, during trial, and/or with the concluding instructions, depending on the preference of the judge.

101 Duty of Jurors—Admonishment**Members of the Jury:**

You have been selected as jurors and have taken an oath to well and truly try this case. Keep an open mind. Do not make a decision about the outcome of this case until you have heard all the evidence, the arguments of counsel, and my final instructions about the law you will apply to the evidence you have heard.

Your decision must be based only on the evidence presented during this trial and my instructions on the law. It would not be fair for you to base your decision on information that you acquire outside the courtroom from a source that cannot be challenged or cross-examined by the parties.

Therefore, from now until the trial ends, you must not:

- Conduct research on your own or as a group,
- Use dictionaries, the Internet, Google, or any other resource to gather any information about the issues in this case, the law that applies to the case, or the people involved in the case, including the parties, witnesses, lawyers, or the judge.
- Investigate the case, conduct any experiments, or attempt to gain any specialized knowledge about the case, or
- Receive assistance in deciding the case from any outside source.

You also must not:

- Use laptops or cell phones in the courtroom or in the jury room,
- Consume any alcohol or drugs that could affect your ability to hear and understand the evidence,
- Read, watch, or listen to anything about this trial from any source whatsoever, including newspapers, radio, television, or the Internet,
- Listen to discussions among, or receive information from, other people about this trial, or
- Visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate.

Finally, you must not:

- Talk to any of the parties, their lawyers, any of the witnesses, or members of the media. If anyone tries to talk to you about this case, you must tell my court staff or me immediately.

You may discuss the evidence with your fellow jurors during the trial, but only in the jury room, and only when all of you are present. Even though you are permitted to have these discussions, you must not make a decision about the outcome of this case until your final deliberations begin. Until you reach a verdict, do not communicate about this case or your deliberations with anyone else.

You must not communicate with anyone or post information about the case, or what you are doing in the case, by any means, including telephone, text messages, email, internet chat rooms, blogs, or social websites, such as Facebook or Twitter.

During the trial, you may tell people who need to know that you are a juror, and you may give them information about when you will be required to be in court. But you must not talk with them or others about anything else related to the case. Only you have been found to be fair, and only you have promised to be fair. No one else has met the qualifications to serve on this jury. After your service on this jury is concluded, you are free to talk with anyone about the case or do whatever research you wish.

[Our law does not permit you to visit a place discussed in the testimony because you cannot be sure that the place is in the same condition as it was on the day in question. Also, even if it were in the same condition, once you go to a place to evaluate evidence in light of what you see there, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair.]

These rules are designed to help guarantee a fair trial. I know you will follow these rules, in accord with your oath and promise.

Comments

Each time the jury is allowed to separate, the trial court is required to admonish jurors concerning their conduct. Ind. Code § 34-36-1-5. The Committee has expanded this instruction to specify several prohibitions and to explain the reasons for those prohibitions. This instruction represents an attempt to reconcile Ind. Jury Rule 20(a)(8) and Ind. Trial Rule 47(B). Indiana Jury Rule 20(a)(8) requires a court to instruct the jury “that jurors, including alternates, are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence. The court shall admonish jurors not to discuss the case with anyone other than fellow jurors during the trial.” Ind. Trial Rule 47(B) states in part, however, “If alternate jurors are permitted to attend deliberations, they shall be instructed not to participate.”

The admonition concerning drugs and alcohol is based upon *Schultz v. Valle*, 464 N.E.2d 354, 357 (Ind. Ct. App. 1984) and *Majors v. State*, 773 N.E.2d 231 (Ind. 2002).

In cases where a jury view is anticipated, the provisions relating to visiting places in this Instruction should be modified accordingly.

This instruction is longer than some previous versions of a juror admonishment because it explains the reason behind the rules that the jurors must follow. Jurors, as adults, need to know why they need to learn something before they undertake to learn it. See, e.g., MALCOLM S. KNOWLES ET. AL, *THE ADULT LEARNER: THE DEFINITIVE CLASSIC IN ADULT EDUCATION & HUMAN RESOURCE DEVELOPMENT* (7th ed. 2011).

103 Personal Knowledge of a Juror

If you realize that you have personal knowledge about this case, you must inform my court staff or me immediately.

Comments

Indiana Jury Rule 20(a)(5) requires the trial court to include a preliminary instruction informing the jurors of the procedure to be followed when a juror has personal knowledge under Jury Rule 24, which is entitled, "Procedure for Juror with Personal Knowledge in Criminal Cases." Although the title to Jury Rule 24 indicates it applies to criminal cases, nothing in the text of the rule itself indicates it is so limited. A statute also mandates an instruction regarding a juror's personal knowledge in criminal (but not civil) cases. Ind. Code § 35-37-2-3. Although it is not required, the Committee strongly recommends giving this instruction in civil cases.

Jury Rule 24 provides as follows:

If the court receives information that a juror has personal knowledge about the case, the court shall examine the juror under oath in the presence of the parties and outside the presence of the other jurors concerning that knowledge.

If the court finds that the juror has personal knowledge of a material fact, the juror shall be excused, and the court shall replace that juror with an alternate. If there is no alternate juror, then the court shall discharge the jury without prejudice, unless the parties agree to submit the cause to the remaining jurors.

105 Law to the Court, Facts to the Jury

Judges and jurors perform different tasks. I will instruct you on the law, both now and after all the evidence has been presented. You will decide the facts in this case. Then you will decide the outcome of this case by applying my instructions to the facts.

Comments

“The purpose of all instructions is to inform the jury as to the law applicable to the facts of the particular case.” *Lindley v. Sink*, 218 Ind. 1, 18, 30 N.E.2d 456, 462 (1940). “The facts when disputed are for the jury alone to determine under appropriate instructions by the court as to the law.” *McCague v. New York, C. & S. L. R. Co.*, 225 Ind. 83, 105, 71 N.E.2d 569, 578 (1947) (dissenting opinion).

Clyde E. Williams & Assoc. v. Boatman, 375 N.E.2d 1138, 1141 (Ind. Ct. App. 1978), discusses the issue of duty in the context of jury instructions:

While it is clear that the trial court must determine if an existing relationship gives rise to a duty, it must also be noted that a factual question may be interwoven with the determination of the existence of a relationship, thus making the ultimate existence of a duty a mixed question of law and fact. This dichotomy presents a trial court with a difficult problem in the drafting of instructions.

In *Clyde E. Williams & Assoc.*, the jury was instructed to consider whether the defendant had a duty, but was not given any direction about how to make that determination. The Court of Appeals stated that “it would be proper to instruct the jury alternatively that if it should find a certain set of facts, then a duty exists; however, should the jury reach a different factual conclusion, then no duty would exist.” *Clyde E. Williams & Assoc.*, 375 N.E.2d at 1141. This duty question may arise, for example, in the context of premises liability where certain duties apply based on the status of the person on the property. *Clyde E. Williams & Assoc.*, 375 N.E.2d at 1141.

107 Instructions Considered as a Whole

Consider all of my preliminary and final instructions together. Do not single out any individual sentence, point, or instruction and ignore the others.

Comments

This instruction is based on Indiana Pattern Jury Instruction (Criminal) No. 13.01.

109 Issues for Trial; Burden of Proof

The Plaintiff, _____, sued _____, the Defendant.

[*Plaintiff*] claims that [*defendant*][*insert claimed action(s)*]. [*Plaintiff*] must prove [his][her][its] claims by the greater weight of the evidence.

[*Defendant*] denies [*plaintiff*]'s claims. [*Defendant*] is not required to disprove [*plaintiff*]'s claims.

[*Defendant*] has claimed certain defenses. [*Defendant*] must prove [his][her][its] defense[s] of [*specify affirmative defense(s)*] by the greater weight of the evidence.

[(*Plaintiff*) also claims (he)(she)(it) is entitled to an award of punitive damages because (*insert brief statement of claim for punitive damages*). (*Plaintiff*) must prove this claim by clear and convincing evidence.]

Comments

This instruction should be modified to set forth all claims, counterclaims, and cross claims.

Jury Rule 20 and Trial Rule 51(A) require that the trial court give preliminary instructions as to the issues for trial and the burden of proof. The trial court and counsel should carefully prepare a preliminary instruction setting out the issues for trial in narrative form, including all claims, counterclaims, and cross claims. The instruction should be brief, accurate, conversational, and as non-technical as possible.

If a pretrial order has been entered, *see* T.R. 16(J), the Committee recommends that the instruction be drafted based on that order, which supplants the allegations in the pleadings, but should not be rigidly or pointlessly applied. *See Vlach v. Goode*, 515 N.E.2d 569 (Ind. Ct. App. 1987); 62A Am. Jur. 2d PreTrial Conference § 19 at 661.

Whether a pretrial order has been entered or not, the Committee recommends against reading the pleadings to the jury.

111 Greater Weight of the Evidence (Preponderance of the Evidence)

Evidence is of the greater weight if it convinces you more strongly of its truthfulness. It is evidence that convinces you that something is more probably true than not true.

A greater number of witnesses testifying to a fact on one side or a greater quantity of evidence introduced on one side does not necessarily amount to the greater weight of the evidence.

Comments

Indiana Jury Rule 20(a)(2) requires a trial court to give a preliminary instruction on the applicable burden or burdens of proof. This means that the trial court should give either this instruction or the instruction on clear and convincing evidence, or both.

American Maize Products Co. v. Widiger, 186 Ind. 227, 229, 114 N.E. 457, 458 (1916), upheld a jury instruction that defined “preponderance of the evidence” as the greater weight of the evidence, stating, “In our opinion this is a fair statement of the law relating to what constitutes a preponderance of the evidence.” See also *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 361 (Ind. 1982) (citing *Great Atlantic & Pacific Tea Co. v. Custin*, 214 Ind. 54, 61, 14 N.E.2d 538 (1938)) (“Preponderance of the evidence,” when used with respect to determining whether or not one’s burden of proof has been met, simply means the “greater weight of the evidence.”).

113 Clear and Convincing Evidence

Proof by clear and convincing evidence is a higher standard of proof than proof by the greater weight of the evidence.

Proof of a claim by clear and convincing evidence means that the facts supporting that claim are highly probable.

In criminal law we require that crimes be proved by an even higher standard of proof called beyond a reasonable doubt. We do not use this higher standard in civil cases, but the concept of beyond a reasonable doubt helps us to understand the concept of clear and convincing evidence. Clear and convincing evidence is a higher standard than the greater weight of the evidence, but a lower standard than beyond a reasonable doubt.

Comments

Indiana Jury Rule 20(a)(2) requires a trial court to give a preliminary instruction on the applicable burden or burdens of proof. This means that the trial court should give either this instruction or the instruction on the greater weight of the evidence, or both.

Clear and convincing evidence is an intermediate standard of proof greater than a preponderance of the evidence and less than proof beyond a reasonable doubt. It requires the existence of a fact to be highly probable. *Lazarus Dep't Store v. Sutherlin*, 544 N.E.2d 513, 527 (Ind. Ct. App. 1989).

The clear and convincing evidence standard is used, for example, in punitive damages and certain defamation claims. See, e.g., *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); Ind. Code § 34-51-3-2; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

115 Credibility of Witnesses—Weighing Evidence

You alone are the judges of the evidence, including the credibility of witnesses. Credibility means believability. A credible witness is a witness whose testimony you believe.

In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe what he or she has testified about; the manner and conduct of the witness while testifying; any interest, bias, or prejudice the witness may have; any relationship the witness may have with other witnesses or interested parties; and the reasonableness of the witness's testimony considered in the light of all the evidence you have heard.

Assume that each witness has testified truthfully. If you find conflicts in the evidence, reconcile those conflicts, if you can, based on the assumption that each witness has testified truthfully.

Do not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony that you cannot reconcile, decide what testimony you believe and what testimony you disbelieve.

In deciding what or whom you believe, you should use your own knowledge, experience, and common sense gained from day-to-day living.

Comments

Indiana Jury Rule 20(a)(3) requires a trial court to give a preliminary instruction on the credibility of witnesses and the manner of weighing the testimony to be received.

Indiana Trial Rule 51(A) requires a preliminary instruction on these same topics, and also provides that the court may on its own motion, or shall on any party's request, re-read any or all of the preliminary instructions. In light of this rule, the Committee recommends that this instruction be read again as part of the final charge to the jury.

117 Exhibits/Court Rulings

During the trial, the parties may offer exhibits as evidence. I will decide whether to admit the exhibit as evidence. When I admit an exhibit as evidence, you should carefully examine it without comment while you are in the courtroom.

Rules of law strictly control the admissibility of evidence. The attorneys may ask certain questions or offer certain exhibits that I may rule are not admissible into evidence. Do not consider or speculate about evidence that I do not admit or order stricken from the record. Treat such evidence as though you had never seen or heard it.

Nothing I say or do is intended to suggest what you should believe about the facts in this case, or what your verdict should be. Each of you, as jurors, must determine the facts and the verdict.

Comments

The sending of exhibits to the jury room is within the sound discretion of the trial court when the exhibits will aid the jury in a proper consideration of the case, no party will be unduly prejudiced by the exhibits, and the jury could not misuse the exhibits. *Robinson v. State*, 699 N.E.2d 1146 (Ind. 1998); *Pearson v. State*, 441 N.E.2d 468 (Ind. 1982). Depositions or writings containing prior statements of witnesses similar to depositions should not be sent to the jury room, especially when admitted for some purpose other than the truth of the statements. *Thomas v. State*, 259 Ind. 537, 289 N.E.2d 508 (1972), *questioned by Caton v. Hardamon*, 496 F.2d 6, 7 (7th Cir. Ind. 1974).

119 Juror Note-Taking

Judge the evidence from your memory of the testimony of the witnesses and any exhibits admitted into evidence. I will not provide a written transcript of any testimony. Therefore, listen carefully as the evidence is presented.

You may take notes during the trial. Paper will be provided. Do not become so involved in note-taking that you fail to listen carefully to the evidence and observe the witnesses as they testify.

Your notes are not evidence in this case. They are only an aid to your memory of the evidence. Do not give your notes or your fellow jurors' notes any greater weight than your memory or impression of the actual evidence.

You may only disclose your notes to your fellow jurors while you are all together in the jury room. Do not disclose your notes to anyone else. Do not take your notes outside of the courtroom or jury room. When your notes are not in your possession, no one will be allowed to read them. After your verdict is returned, your notes will be destroyed.

Comments

Indiana Jury Rule 20(a)(4) requires a trial court to give a preliminary instruction stating that "each juror may take notes during the trial and paper shall be provided, but note taking shall not interfere with the attention to the testimony."

The court may also authorize juror trial books that may contain given instructions, information regarding the anticipated trial schedule, witness lists, and copies of admitted exhibits. Ind. Jury Rule 23.

121 Juror Questions—Procedure

You may have questions that you want to ask a witness. Do not address any questions directly to a witness, the lawyers, or your fellow jurors. Instead, if you have questions, raise your hand after the attorneys have asked all of their questions, and before the witness has left the witness stand. Write down your questions. The questions will be collected and I will review them with the attorneys. I will then decide whether your questions are permitted by law. If a question is permitted, I will ask the witness the question. If it is not permitted, do not speculate why a question was not asked or what the answer may have been.

Comments

Indiana Jury Rule 20(a)(7) requires the trial court to give a preliminary instruction informing jurors that they may seek to ask questions of the witnesses by submitting questions in writing. Experience suggests more juror questions are submitted if before excusing each witness the judge asks the panel whether any member has a question for the witness.

A trial court must give a preliminary instruction that does not leave the jurors in doubt as to how they may ask questions. *Howard v. State*, 818 N.E.2d 469, 480 (Ind. Ct. App. 2004), *trans. denied*. A trial court is merely required not to leave the jurors in doubt as to how to submit a question. *Id.* The court's method of accomplishing this requirement is reviewed for an abuse of discretion. *See id.* at 480; *Dowdy v. State*, 672 N.E.2d 948, 953 (Ind. Ct. App. 1996).

The procedure to be used for juror questions is outlined in Indiana Evidence Rule 614(d). Questions are to be submitted in writing to the judge, who then decides whether to submit the questions to the witness subject to objections from the parties. The parties may object at the time or at the next available opportunity outside the presence of the jury. The judge must rule on both the appropriateness of the written questions and any objections before the questions may be submitted to the witness. A sample jury question form prepared by the Jury Committee of the Judicial Conference of Indiana is available online at <https://www.in.gov/judiciary/iocs/files/jury-juror-questions-sample.pdf>.

For the procedure to be used when a deliberating jury has questions, *see* Ind. Jury Rule 28 (assisting jurors at an impasse) and Ind. Code § 34-36-1-6 (questions during deliberations).

123 Conduct of Trial

First, the attorneys will have an opportunity to make opening statements. These statements are not evidence. They are only previews of what the attorneys anticipate the evidence will be.

Following the opening statements, the attorneys begin presenting the evidence. They may call witnesses to testify under oath. The attorneys may also offer documents and other exhibits as evidence.

When the evidence is completed, the attorneys will make final, or closing, arguments. These final arguments are not evidence, but are given to help you evaluate the evidence. The attorneys are also permitted to argue, to characterize the evidence, and to attempt to persuade you to a particular verdict. You may accept or reject those arguments as you see fit.

Comments

Indiana Jury Rule 20(a)(6) requires the trial court to include a preliminary instruction informing the jurors of the order in which the case will proceed.

CHAPTER 300

GENERAL INSTRUCTIONS

SYNOPSIS

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Introduction

This chapter contains instructions that may be used with the preliminary instructions, during trial, and/or with the concluding instructions, depending on the preference of the judge.

CHAPTER ONE

CIVIL JURY INSTRUCTIONS

Introduction

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301 Responsible Cause (Proximate Cause)—Definition

A person's conduct is legally responsible for causing [an injury][property damage][a death] if:

- (1) the [injury][property damage][a death] would not have occurred without the conduct; and
- (2) the [injury][property damage][a death] was a natural, probable, and foreseeable result of the conduct.

This is called a “responsible cause.”

[There can be more than one responsible cause for an injury.]

Comments

Scholars identify the use of legal jargon and arcane legalese as the most serious flaws of contemporary jury instructions. John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1209 (2002). In fact, in one study of 14 jury instructions, the proximate cause instruction produced proportionally the most misunderstanding among laypersons. The study revealed that jurors mistake “proximate cause” for “approximate cause,” “estimated cause,” or some fabrication. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979); *see also* Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L.J. 456, 468 (1962) (“proximate cause” is frequently misinterpreted to mean “probable” or “approximate cause”); James D. Wascher, *The Importance of Juries: The Long March Toward Plain English Jury Instructions*, 19 Chicago Bar Ass’n Record 50, 50–51 (2005) (a Chicago judge reported that he presided over a trial in which the jury sent him a note asking whether proximate cause meant “it’s pretty close to the cause”).

Prosser and Keeton say that proximate cause is “is an unfortunate word, which places entirely the wrong emphasis on the factor of physical or mechanical closeness.” Prosser & Keeton, *The Law of Torts* § 42. They even imply that it was a sin to have coined the term “proximate cause” in the first place. Prosser & Keeton, *The Law of Torts* § 42. (“The word ‘proximate’ is a legacy of Lord Chancellor Bacon, who in his time committed other sins.”) The Committee has determined that use of a term so likely to be misunderstood is against the policy behind clear jury instructions.

There are two types of causation in a negligence case—causation in fact and proximate cause. *See, e.g.,* Prosser & Keeton, *The Law of Torts* §§ 41 (causation in fact), 42 (proximate cause) (5th ed. 1984). Causation in fact is the threshold question of whether “but for” the defendant’s negligent conduct, plaintiff’s harm would not have occurred. Or, to put it another way, plaintiff’s harm would not have occurred without the defendant’s negligent conduct. *Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981) (citing W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971); 21 I.L.E. Negligence § 62 (1959)). Because the consequences of an act go forward to eternity and back before the dawn of human events, there must also be “some reasonable connection between the act or omission

of the defendant and the damage which the plaintiff has suffered.” W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971). This is proximate cause, and it boils down to “whether the conduct has been so significant and important a cause that the defendant should be legally responsible.” W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971). Prosser and Keeton therefore suggest that either “responsible cause” or “legal cause” would be a more appropriate term. W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971). Because use of the term “legal cause” might suggest to the jury that there could also be an “illegal cause,” the Committee selected “responsible cause.”

The Indiana Supreme Court has held that a proximate cause instruction is not *required* to refer to “but for” causation, “so long as the instructions as a whole adequately convey the law in this area.” *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 301 (Ind. 2009). To ensure that the instructions as a whole *do* adequately convey both proximate cause and causation in fact, the Committee has included both concepts in this one instruction. Subpart (1) of the instruction (“the injury would not have occurred without the conduct”) instructs on causation in fact. And because the Indiana Supreme Court has explained proximate cause as the natural and probable consequence of the conduct, subpart (2) of the instruction (“the injury was a natural and probable result of the conduct”) instructs on proximate cause. “A negligent act is said to be the proximate cause of an injury ‘if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.’ ” *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003) (quoting *Bader v. Johnson* 732 N.E.2d 1212, 1218 (Ind. 2000)).

Plaintiff in a negligence action has the burden of proving causation in fact by a preponderance of the evidence. *Turner v. Davis*, 699 N.E.2d 1217 (Ind. Ct. App. 1998) (causation in fact); *Carter v. Aetna Life Ins. Co.*, 217 Ind. 282, 27 N.E.2d 75 (1940) (proximate cause). What is the proximate cause of the injury is ordinarily a question of fact for the jury that becomes a question of law when only a single conclusion can be drawn from the facts. *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101 (Ind. Ct. App. 1999).

The court is not required to repeat the substance of an instruction defining proximate cause, and outlining the necessity of establishing it, in every general instruction relating to the subject of negligence. *Swallow Coach Lines, Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938).

The “conduct” discussed in this Instruction includes acts and omissions. *See, e.g.*, Instruction Nos. 909 and 1107.

There can be more than one responsible cause for an injury. *See, e.g.*, *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006) (“An injury may have more than one proximate cause.”); *Board of Comm’rs v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992) (“There may be more than one proximate cause of an event.”); *Krohn v. Shidler*, 140 Ind. App. 175, 185 (1966) (“It is not necessary that such negligence be the sole proximate cause.”). The bracketed sentence about multiple responsible causes should be given when it is an issue in the case.

302 Foreseeable—Defined

[An injury][Property damage][A death] is “foreseeable” when a person should realize that [his][her] act or failure to act might cause harm.

Comments

In the context of proximate/responsible cause, the question is whether the injury “is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.” *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 108 (Ind. 2002) (citing *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000)). “The determination of what is reasonably foreseeable is not judged by the subjective opinions of those involved, but is based upon the standard of due care in avoiding a result which might reasonably have been anticipated in the ordinary experience of people.” *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 917–18 (Ind. Ct. App. 2001) (citing *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101, 1105 (Ind. Ct. App. 1999)). When some harm is foreseeable, a person is responsible for any injury even if the extent of the injury was unforeseeable. *Bolin v. Wingert*, 764 N.E.2d 201, 207–08 (Ind. 2002). “If the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor’s negligence.” *Hampton v. Moistner*, 654 N.E.2d 1191, 1194 (Ind. Ct. App. 1995).

General Instructions

303 Intervening Cause

Sometimes an unrelated event breaks the connection between a defendant's negligent action and the injury a plaintiff claims to have suffered. If this event was not reasonably foreseeable, it is called an "intervening cause."

When an intervening cause breaks the connection between a defendant's negligent act and a plaintiff's injury, a defendant's negligent act is no longer a "responsible cause" of that plaintiff's injury.

Comments

In general, a defendant's act is a proximate cause of an injury if the injury is the natural and probable consequence of the act and should have been reasonably foreseen and anticipated in light of the circumstances. *Scott v. Retz*, 916 N.E.2d 252, 257–58 (Ind. Ct. App. 2009). The chain of proximate causation can be broken if an independent agency intervenes between the defendant's negligence and the resulting injury. *Scott*, 916 N.E.2d at 257. The key to determining whether an intervening agency has broken the original chain of causation is whether, under the circumstances, it was reasonably foreseeable that the agency would intervene in such a way as to cause the resulting injury." *Scott*, 916 N.E.2d at 257; *see also Conder v. Hull Lift Truck, Inc.*, 435 N.E.2d 10, 14 (Ind. 1982). The analysis has three factors—whether the intervening actor: (1) is independent from the original actor, (2) has complete control over the instrumentality of the harm, and (3) is in a better position than the original actor to prevent the harm. *Scott*, 916 N.E.2d at 258.

The doctrines of causation and foreseeability impose the same limitations on liability as the "superseding cause" doctrine. . . . A superseding cause is, by definition, one that is not reasonably foreseeable. As a result, the doctrine in today's world adds nothing to the requirement of foreseeability that is not already inherent in the requirement of causation.

Control Techniques, Inc. v. Johnson, 762 N.E.2d 104, 108 (Ind. 2002). This instruction is, therefore, not required; trial courts may, however, elect to give it if it would aid the jury in determining liability. *Control Techniques, Inc.*, 762 N.E.2d at 110.

Because the Comparative Fault Act did not change the standard for imposing liability—it merely altered the apportionment of damages flowing from that liability—the Act did not affect the doctrine of superseding cause. *Control Techniques, Inc.*, 762 N.E.2d at 109. To say there is a "superseding cause" foreclosing one actor's liability is to say in comparative fault terms that the original actor did not cause the harm and receives zero share of any liability. *Control Techniques, Inc. v. Johnson*, 762 N.E.2d at 109.

305 Direct Evidence & Circumstantial Evidence

The parties in this case may prove a fact by one of two types of evidence—direct evidence or circumstantial evidence.

Direct evidence is direct proof of a fact. Circumstantial evidence is indirect proof of a fact.

For example, direct evidence that an animal ran in the snow might be the testimony of someone who actually saw the animal run in the snow. On the other hand, circumstantial evidence that an animal ran in the snow might be the testimony of someone who only saw the animal’s tracks in the snow.

It is not necessary that any fact be proved by direct evidence. You may consider both direct evidence and circumstantial evidence as proof.

General
Instructions

307 [Opinion][Expert][Skilled] Witness

Generally, a witness may not express an opinion. However, a witness may be permitted to express an opinion because of [his][her] knowledge, skill, experience, training, or education.

Consider opinion testimony in the same manner as other testimony. In deciding how much weight to give opinion testimony, you may also consider:

- (1) the witness's skill, experience, knowledge, and familiarity with the facts of this case;
- (2) the reliability of the information supporting the witness's opinions; and
- (3) the reasons for the opinions.

Comments

This instruction is patterned after the language found in Indiana (Criminal) Pattern Jury Instruction No. 12.29 and Ind. Evidence Rule 702(a).

"An expert witness may express his opinion regarding a hypothetical question if the following foundational prerequisites are satisfied: (1) the expert's ability to give such an opinion must be established through testimony showing he has the requisite knowledge, skill, education, or experience on which to base the opinion; and (2) there must be a proper evidentiary foundation supporting the facts that are included in the hypothetical question." *Lasater v. Lasater*, 809 N.E.2d 380, 394 (Ind. Ct. App. 2004) (citing *Johnson v. State*, 699 N.E.2d 746, 750 (Ind. Ct. App. 1998)).

While the Committee replaced the bracketed paragraph in the previous version of this instruction on hypothetical questions ("The attorneys have asked questions in which the expert witness was to assume that certain facts were true and to give an opinion based upon such assumptions. You must decide whether the assumed facts, upon which the expert based the opinion, are true. If you decide any assumed fact is not true, then you should decide what effect, if any, that has on the expert's opinion.") with subpart 2 ("the reliability of the information supporting the witness's opinions"), the Committee believes this instruction (as it is currently written) is still applicable to hypothetical questions. Parties may also want to address the issue of hypothetical questions in closing argument.

309 Agreed/Stipulated Facts

The parties in this case have agreed that certain facts are true. You must accept these facts as true: *[insert agreed facts]*.

Comments

Except for minor changes, this instruction adopts the language found in Indiana (Criminal) Pattern Jury Instruction No. 12.39.

This instruction should be given at the time of the stipulation.

General
Instructions

311 Depositions

A party may present testimony by way of a written or videotape [deposition][transcript of testimony].

[A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and the lawyer for each party may ask questions. A court reporter is present and records the questions and answers.]

[A transcript is the sworn testimony of a witness from a prior trial or legal proceeding.]

Evaluate this testimony using the same rules you apply to the testimony of other witnesses.

Comments

This instruction is patterned after the language found in Indiana (Criminal) Pattern Jury Instruction No. 12.43. This instruction should be given as a preliminary instruction or at the time the event occurs. It may also be given as a final instruction.

Depositions or writings containing prior statements of witnesses similar to depositions should not be sent to the jury room, especially when admitted for some purpose other than the truth of the statements. *Thomas v. State*, 289 N.E.2d 508 (Ind. 1972), *questioned by Caton v. Hardamon*, 496 F.2d 6, 7 (7th Cir. 1974).

313 Judicially Noticed Facts

I have taken judicial notice that [*state facts that are judicially noticed*]. You must accept that fact as true.

Comments

- This instruction is required to be given when the court takes judicial notice of any fact. Ind. Evidence Rule 201(g); *see also* Instruction No. 707 (judicial notice of mortality tables).

315 Jury View

I am permitting you to view [*state what is to be viewed*]. The purpose of the view is to help you to better understand and weigh the evidence introduced in the courtroom. Do not consider what you see at the scene as evidence.

During your trip, you must not:

- (1) talk about the case among yourselves or with anyone else;
- (2) talk to the attorneys, parties, or witnesses;
- (3) express any opinion about the case;
- (4) listen to or read any outside or media accounts of the trial; or
- (5) conduct an independent investigation.

After you arrive, remain together as a group. The bailiff will supervise you during the view.

Comments

This instruction is patterned after the language found in Indiana (Criminal) Pattern Jury Instruction No. 12.45. A judge should read this instruction to the jury at the time the view is taken. Ind. Code § 34-36-1-3 provides statutory authorization for a jury view. *See also* Ind. Jury Rule 25, which provides in relevant part:

When the court determines it is proper, the court may order the jury to view:

- (a) the real or personal property which is the subject of the case; or
- (b) the place in which a material fact occurred.

The place shall be shown to the jury by a person appointed by the court for that purpose. While the jury is absent for the view, no person, other than the person appointed to show the place to the jury, shall speak to the jury on any subject connected with the trial.

A jury's view of a location is not evidence, but rather is intended to aid a jury's understanding of evidence presented at trial. *Grand T. W. R. Co. v. Pursley*, 530 N.E.2d 139 (Ind. Ct. App. 1988); *see also* *Stephenson v. State*, 742 N.E.2d 463, 493 (Ind. 2001) (criminal context).

317 Privileges

I have decided that [name of witness] is not required to answer certain questions, because [he][she] is entitled to the [name of privilege] privilege as to those questions. You must not consider in any way the fact that [name of witness] has not answered those questions.

Comments

If a party against whom the jury might draw an adverse inference from a claim of privilege requests this instruction, a trial judge is required to give it. Ind. Evidence Rule 501(d)(3). This principle does not apply to claims of privilege against self-incrimination made in a civil case and this instruction should not be given under such circumstances. See Evid. R. 501(d).

General Instructions

319 Insurance Not to Be Considered

In deciding this case, you must not consider or speculate about whether [either][any] party has insurance.

Comments

Evidence that a person was or was not insured is inadmissible on the issue of whether the person acted negligently or otherwise wrongfully. Ind. Evid. R. 411. This rule does not require the exclusion of evidence of insurance when offered for another purpose, such as proof of agency, ownership, control, or bias or prejudice of a witness. Ind. Evid. R. 411; *see also Rausch v. Reinhold*, 716 N.E.2d 993, 1002 (Ind. Ct. App. 1999); *see also* Ind. Code § 34-44-1-2 (collateral source rule).

Many states have similar instructions prohibiting jury consideration of whether either party has insurance. *See, e.g.*, Alabama Civil Pattern Jury Instruction 1.12A; Alaska Civil Pattern Jury Instruction 1A.10; Judicial Council of California Jury Instruction 105; Illinois Civil Pattern Jury Instruction 3:03; Maine Civil Pattern Jury Instruction Form 7-105; New Hampshire Civil Jury Instruction 9.5; New Mexico Uniform Jury Instruction (Civil) ch. 2; Tennessee Civil Jury Instruction Civil 1.05; Virginia Practice Series Jury Instructions 7:07; Washington Civil Pattern Jury Instruction 2.13.

321 Assess Damages Separately—Two or More Plaintiffs

If you decide that any plaintiff is entitled to recover damages, you must separately decide the amount owed to that plaintiff and list that amount on the verdict form[s].

Comments

This instruction should be used when causes are consolidated but not in actions involving joint tortfeasors or vicarious liability, such as master and servant. See Instruction No. 323.

In deciding whether to join two plaintiffs against one defendant in a single action, the trial court must consider whether it can provide complete, effective relief to the parties in one action without being unfair to the party who is joined or the parties that did not seek joinder. *Alumax Extrusions, Inc. v. Evans Transp. Co.*, 461 N.E.2d 1165 (Ind. Ct. App. 1984).

Where two obligors incur separate and several liabilities, recovery from one does not foreclose actions against the remaining obligors. *Consolidated Rail Corp. v. Travelers Ins. Cos.*, 466 N.E.2d 709 (Ind. 1984).

323 Joint and Several Liability—Non-Comparative Fault Cases

If you decide that [plaintiff] is entitled to recover damages from more than one defendant, you must decide whether the damages should be divided among the defendants.

If you find by the greater weight of the evidence that:

- (1) those defendants acted together in causing [plaintiff]'s [injury] [injuries][damages]; or
- (2) the independent acts of those defendants combined to produce a single injury; or
- (3) [defendant employee] was acting within the scope of [his][her] employment for [defendant employer] when [defendant employee] caused [plaintiff]'s [injury][injuries][damages],

then those defendants are [both][all] liable for the entire amount of [plaintiff]'s damages and you return a verdict in a single amount for the total damages against [all][both] defendants.

Do not consider the amount that any individual defendant will pay toward your verdict. [Plaintiff] will not collect more than the total amount of your verdict.

However, if you find by a greater weight of the evidence that each defendant's negligent acts caused a separate and distinct harm to [plaintiff], then you must divide the damages among those defendants and award damages against each defendant for the separate harm [he][she] caused.

Comments

For applicable verdict forms, see Verdict Forms 5019–5023.

Where a logical basis can be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm which he has in fact caused, it may be expected that the division will be made. Where no such basis can be found and any division must be purely arbitrary, there is no practical course except to hold the defendant for the entire loss, notwithstanding the fact that other causes have contributed to it.

Dunn v. Cadiente, 516 N.E.2d 52, 56 (Ind. 1987).

This instruction should be used only when the defendants are joint tortfeasors or are jointly liable. It must be noted that joint liability did not survive the enactment of the Comparative Fault Act. *R.L. McCoy, Inc. v. Jack*, 772 N.E.2d, 987, 989–90 (Ind. 2002) (Indiana's comparative fault system "replaced joint and several liability with several liability, leaving each defendant responsible only for its share of the total liability.")

Joint liability may be established if the acts of various tortfeasors through cooperation or in concert accomplish a particular wrong. *Young v. Hoke*, 493 N.E.2d 1279, 1280 (Ind. Ct. App. 1986). Joint liability may also be premised upon

independent acts that combine to produce a single injury. *Nance v. Miami Sand & Gravel, LLC*, 825 N.E.2d 826, 835 (Ind. Ct. App. 2005). Finally, joint and several liability may be imposed in cases of vicarious liability premised upon an agency relationship among multiple defendants. *Nance*, 825 N.E.2d at 835 (citing *Henry B. Steeg & Associates, Inc. v. Ryneerson*, 143 Ind. App. 567, 570, 241 N.E.2d 888, 890 (1968)).

A joint tortfeasor is not entitled to contribution from other tortfeasors; instead a plaintiff can sue only one of them or, after receiving a judgment against them all, can collect from any one that he or she chooses. *Barker v. Cole*, 396 N.E.2d 964, 971 (Ind. Ct. App. 1979). Whether a joint venture exists is generally a question for the jury, but what constitutes a joint venture is a question of law for the court. *McKinney v. Public Service Co.*, 597 N.E.2d 1001, 1009 (Ind. Ct. App. 1992).

Because a plaintiff is entitled to only one recovery for a wrong, the traditional common law rule is that payments made in partial satisfaction of a claim must be credited against the remaining liability to prevent a double recovery. *Barker*, 396 N.E.2d 964; *Indiana State Highway Com. v. Morris*, 528 N.E.2d 468 (Ind. 1988). These credits no longer apply in comparative fault cases. *Mendenhall v. Skinner & Broadbent Co.*, 728 N.E.2d 140 (Ind. 2000) (no credits to non-settling defendants for amounts paid for the same injury by settling defendants who were not non-party defendants at trial); *R.L. McCoy v. Jack*, 772 N.E.2d 987 (Ind. 2002) (no credits to severally liable defendants who go to trial for amounts paid by nonparty settling defendants).

Indiana had long adhered to the rule that recovery from or the release of one joint tortfeasor foreclosed action against the remaining tortfeasors. *Consolidated Rail Corp. v. Travelers Ins. Cos.*, 466 N.E.2d 709 (Ind. 1984). In 1992, the Indiana Supreme Court held that this release rule is abolished in both common law negligence and comparative fault actions. *Huffman v. Monroe County Community Sch. Corp.*, 588 N.E.2d 1264, 1267 (Ind. 1992).

325 Res Ipsa Loquitur

There are certain situations in which the nature of an incident and the circumstances surrounding it lead to the reasonable belief that it would not have occurred unless someone did not use reasonable care.

If [plaintiff] proves all of the following by the greater weight of the evidence:

- (1) [plaintiff] was [injured][harmed][damaged][as a result of][when][here insert event which plaintiff claims was a responsible cause of injury/damage/harm];
- (2) only the [defendant][defendant's agent] controlled [insert name of instrumentality]; and
- (3) under normal circumstances the [event][insert event] would not have occurred unless the [defendant][defendant's agent] was negligent,

then you may infer that the incident resulted from [defendant]'s negligence. You may consider this inference with all of the other evidence in arriving at your verdict.

Comments

In Indiana, *res ipsa loquitur* is not a rule of proximate cause, but rather a rule of evidence allowing a permissible inference of negligence under a certain set of facts. *New York, C. & S. L. R. Co. v. Henderson*, 237 Ind. 456, 146 N.E.2d 531 (1957) (It should be noted, however, that the drawing of such inference in itself does not fix the proximate cause of the accident, but the jury must still determine the proximate cause, even though such permissible inference of negligence is drawn. The doctrine of *res ipsa loquitur* is not a rule which fixes the proximate cause of an injury, but only a rule of evidence allowing a permissible inference of negligence under a certain set of facts.); *Hammond v. Scot Lad Foods, Inc.*, 436 N.E.2d 362, 365 (Ind. Ct. App. 1982). The doctrine operates on the premise that negligence, like any other fact or condition, may be proved by circumstantial evidence. *Aldana v. Sch. City of E. Chicago*, 769 N.E.2d 1201, 1205 (Ind. Ct. App. 2002). Although negligence may not be inferred from the mere fact that an injury occurred, it may be inferred from the circumstances surrounding the injury. *Aldana*, 769 N.E.2d at 1205. The central question involved in the use of *res ipsa loquitur* is whether the incident more probably resulted from the defendant's negligence rather than some other cause. *Aldana*, 769 N.E.2d at 1205.

A trial court should give a *res ipsa loquitur* instruction if, based on the evidence and the reasonable inferences from the evidence, the jury could reasonably conclude that: (1) the injuring instrumentality was within the exclusive management and control of the defendant, and (2) the accident is of the type that does not ordinarily happen if those who have the management and control exercise proper care. *Briar v. Elder-Beerman Dep't Store*, 645 N.E.2d 8 (Ind. Ct. App. 1994); *Aldana*, 769 N.E.2d at 1205. Although some case law requires a third element (the absence of plaintiff's negligence), *res ipsa loquitur* may be used in comparative fault cases unless the plaintiff was more than 50% at fault. *K-Mart Corp. v. Gipson*, 563 N.E.2d 667, 669 n.3 (Ind. Ct. App. 1990).

To prove the "exclusive control" requirement, the plaintiff must show either that a

specific instrument caused the injury and that the defendant had control over that instrument, or that any reasonably probable causes for the injury were under the control of the defendant. *Slease v. Hughbanks*, 684 N.E.2d 496, 499 (Ind. Ct. App. 1997). At a minimum, the plaintiff must point to an instrument in the defendant's control that was a probable cause of the injury. *Aldana*, 769 N.E.2d at 1205.

A plaintiff need not exclude every possible cause for his injury other than the defendant's negligence; plaintiff need only present evidence that it is more likely than not that there was negligence associated with the cause of an event. *Gold v. Ishak*, 720 N.E.2d 1175, 1182 (Ind. Ct. App. 1999). The *res ipsa loquitur* inference does not vanish when the defendant offers other explanations, but rather stays in the case for the jury to consider it with all the other evidence. *Henderson*, 146 N.E.2d 537-38. Moreover, a plaintiff's specific allegation of defendant's negligence in his or her complaint does not preclude the more general *res ipsa loquitur*. *Henderson*, 146 N.E.2d 539. See *Whetstine v. Menard*, 161 N.E.3d 1274 (Ind. Ct. App. 2020).

327 Violation of Statutory Duty as Fault or Negligence

When the events in this case happened, [Indiana Code § _____][*ordinance number and name*] provided [in part] as follows: [*here set out applicable portions of statute or ordinance*].

If you decide from the greater weight of the evidence that a person violated [Indiana Code § _____][*ordinance number and name*], [and that the violation was not excused], then you must decide that person was negligent.

Comments

A judge giving this instruction should also give the instruction on responsible (proximate) cause, Instruction No. 301. Negligence is defined in Instruction No. 909.

While a court may copy into an instruction pertinent parts of a statute and read them as a part of the written instructions, *Vandalia Coal Co. v. Moore*, 69 Ind. App. 311, 121 N.E. 685 (1919), judges should take care to ensure that the statute is comprehensible to jurors. When more than one statutory violation is alleged, the Committee recommends incorporating all statutory provisions in one instruction. The word “contributorily” should be inserted when the defendant alleges that the plaintiff violated a statute or ordinance. If there is no evidence or inference of excuse for violating a statute, the clause relating to excuse should be omitted. If this clause is used, Instruction No. 329 shall also be given.

Generally, the violation of a statute or ordinance that imposes a duty is negligence per se toward those persons the law is designed to protect. *Zimmerman v. Moore*, 441 N.E.2d 690 (Ind. Ct. App. 1982). For the violation of a statute to be negligence per se, the statute must prescribe an absolute duty so that the jury need not consider the surrounding circumstances to determine whether the actor exercised reasonable care. *Peaches v. Evansville*, 180 Ind. App. 465, 389 N.E.2d 322 (1979). The statute must not have been enacted for a wholly different purpose than to prevent the alleged injury, and the statute must be designed to protect the class of people to which the plaintiff belongs. *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966).

Negligence *per se* does not necessarily mean liability per se, because proximate cause must still be proven. *Blankenship v. Huesman*, 173 Ind. App. 98, 362 N.E.2d 850 (1977); *New York C. R. Co. v. Glad*, 242 Ind. 450, 179 N.E.2d 571 (1962). Judges should therefore give the responsible (proximate) cause instruction along with this instruction.

In addition, while a statutory violation is generally negligence *per se*, it is sometimes merely *prima facie* evidence of negligence, and whether a statutory violation is negligent conduct may become a jury question, because circumstances may excuse technical violations. *Larkins v. Kohlmeyer*, 229 Ind. 391, 400, 98 N.E.2d 896, 900 (1951); *see also Phoenix Natural Res., Inc. v. Messmer*, 804 N.E.2d 842, 848 (Ind. Ct. App. 2004); *Wallace v. Hjelm*, 141 Ind. App. 686, 142 Ind. App. 686, 231 N.E.2d 862 (1967); *but see Hancock Truck Lines, Inc. v. Butcher*, 229 Ind. 36, 94 N.E.2d 537 (1950) (no error to instruct jury that statutory violation was negligence as a matter of law, when there was no evidence or inference of facts

that would excuse such conduct); *Northern Ind. Transit, Inc. v. Burk*, 228 Ind. 162, 89 N.E.2d 905 (1950) (same).

Violation of a regulation is not negligence per se. *Huffman v. Dexter Axle Co.*, 990 N.E.2d 947 (Ind. Ct. App. 2013); *see also* John P. Ludington, *Violation of OSHA Regulation as Affecting Tort Liability*, 79 A.L.R.3d 962 (2010). “Violation of an administrative regulation generally can be considered evidence of negligence for a jury to consider, though it is not negligence per se.” *Beta Steel v. Rust*, 830 N.E.2d 62, 73–74 (Ind. Ct. App. 2005) (citing *Zimmerman v. Moore*, 441 N.E.2d 690, 696 (Ind. Ct. App. 1982)). The trial court may take judicial notice of published regulations of governmental agencies. Ind. R. Evid. 201(b)(3).

329 Excuse from Statutory Violation

A person may be excused from failing to comply with [a statute][an ordinance] if [he][she] proves by the greater weight of the evidence that:

- (1) Compliance was impossible or noncompliance was excusable because of circumstances:
 - (a) beyond the person's control, and
 - (b) not the result of the person's negligence; or
- (2) The [statute][ordinance] provided a specific excuse.

Comments

While a statutory violation is generally negligence *per se*, it is sometimes merely *prima facie* evidence of negligence, and whether a statutory violation is negligent conduct may become a jury question, because circumstances may excuse technical violations. *Larkins v. Kohlmeyer*, 229 Ind. 391, 400, 98 N.E.2d 896, 900 (1951); *see also Phoenix Natural Resources, Inc. v. Messmer*, 804 N.E.2d 842, 848 (Ind. Ct. App. 2004); *Wallace v. Hjelm*, 141 Ind. App. 686, 142 Ind. App. 686, 231 N.E.2d 862 (1967); *but see Hancock Truck Lines v. Butcher*, 229 Ind. 36, 94 N.E.2d 537 (1950) (no error to instruct jury that statutory violation was negligence as a matter of law, when there was no evidence or inference of facts that would excuse such conduct); *Northern Ind. Transit, Inc. v. Burk*, 228 Ind. 162, 89 N.E.2d 905 (1950) (same).

CHAPTER 500

CONCLUDING INSTRUCTIONS

SYNOPSIS

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Introduction

The trial court is required to read appropriate final instructions to the jury and provide each juror with written instructions before the court reads them; jurors shall retain the written instructions during deliberations. Ind. Jury Rule 26.

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501 Introduction to the Court’s Final Instructions

As I said in my preliminary instructions, judges and jurors perform different tasks. I instructed you on the law at the start of this trial, and I will now further instruct you on the law. You will decide the facts of this case. Then you will decide the outcome of this case by applying all of my instructions to those facts.

502 Sympathy, Bias, Prejudice

Do not base your verdict[s] on sympathy, bias, or prejudice.

503 Instructions Considered as a Whole

Consider all of my preliminary and final instructions together. Do not single out any individual sentence, point, or instruction and ignore the others.

Concluding
Instructions

505 Issues for Trial; Burden of Proof

The Plaintiff, _____, sued _____, the Defendant.

[Plaintiff] claims that [defendant][insert claimed action(s)]. [Plaintiff] must prove [his][her][its] claims by the greater weight of the evidence.

[Defendant] denies [plaintiff]'s claims. [Defendant] is not required to disprove [plaintiff]'s claims.

[Defendant] has claimed certain defenses. [Defendant] must prove [his][her][its] defense[s] of [specify affirmative defense(s)] by the greater weight of the evidence.

[(Plaintiff) also claims (he)(she)(it) is entitled to an award of punitive damages because (insert brief statement of claim for punitive damages). (Plaintiff) must prove this claim by clear and convincing evidence.]

Comments

This instruction should be modified to set forth all claims, counterclaims, and cross claims.

Jury Rule 20 and Trial Rule 51(A) require that the trial court give preliminary instructions as to the issues for trial and the burden of proof. The trial court and counsel should carefully prepare a preliminary instruction setting out the issues for trial in narrative form, including all claims, counterclaims, and cross claims. The instruction should be brief, accurate, conversational, and as non-technical as possible.

If a pretrial order has been entered, *see* T.R. 16(J), the Committee recommends that the instruction be drafted based on that order, which supplants the allegations in the pleadings, but should not be rigidly or pointlessly applied. *See Vlach v. Goode*, 515 N.E.2d 569 (Ind. Ct. App. 1987); 62 Am. Jur. 2d PreTrial Conference § 29 at 661 (1972).

Whether a pretrial order has been entered or not, the Committee recommends against reading the pleadings to the jury.

507 Elements; Burden of Proof

[Plaintiff] claims [defendant] was [negligent][designate other type of fault].

To recover on this claim, [plaintiff] must prove by the greater weight of the evidence that:

1. [defendant] acted or failed to act [by][in one or more of the following ways]:
[insert how plaintiff claims that defendant was negligent or otherwise at fault];
2. [defendant]'s act or failure to act was [negligent][designate other type of fault];
3. [defendant]'s act or failure to act was a responsible cause of [plaintiff]'s claimed injuries; and
4. [plaintiff] suffered damages as a result of the injuries.

To recover an award of punitive damages, [plaintiff] must prove by clear and convincing evidence that:

[Here set out the elements of plaintiff's claim for punitive damages to correspond to the factual disputes raised by the evidence.]

[Defendant] denies [plaintiff]'s claims. [Defendant] is not required to disprove [plaintiff]'s claims.

A defendant may defend [himself][herself][itself] by claiming certain specific "defenses." In this case [defendant] claims: [Here set out the elements of defendant's affirmative defenses to correspond to the factual disputes raised by the evidence.] To prove these defenses, [defendant] must prove by the greater weight of the evidence that:

[Here set out the elements of defendant's affirmative defenses to correspond to the factual disputes raised by the evidence.]

Comments

In *Laporte Cmty. Sch. Corp. v. Rosales*, 963 N.E.2d 520, 524 (Ind. 2012), the Indiana Supreme Court criticized an instruction based on Civil Pattern Instruction No. 9.03, stating:

While Instruction 22 may have been intended to explain to the jury that the plaintiff had the burden of proving the elements of negligence, proximate cause, and damages, the language and phrasing of the instruction permitted the jury to infer that the factual allegations set forth in subparts A–E should be understood as factual circumstances identified by the court, based on the facts of the case, that automatically constitute negligence if proven by a preponderance of the evidence.

The Committee has therefore revised this instruction to set forth the elements of negligence.

In element 1, the judge should use "by" if the plaintiff claims the defendant was negligent in one way, and should use "in one or more of the following ways" if the plaintiff claims the defendant was negligent in more than one way.

This instruction is also included in each of the subject matter chapters, Series

900-3900, unless the subject matter chapter already has an instruction tailored to the specific subject matter.

509 Greater Weight of the Evidence (Preponderance of the Evidence)

Evidence is of the greater weight if it convinces you more strongly of its truthfulness. It is evidence that convinces you that something is more probably true than not true.

A greater number of witnesses testifying to a fact on one side or a greater quantity of evidence introduced on one side does not necessarily amount to the greater weight of the evidence.

Comments

Indiana Jury Rule 20(a)(2) requires a trial court to give a preliminary instruction on the applicable burden or burdens of proof. This means that the trial court should give either this instruction or the instruction on clear and convincing evidence, or both.

American Maize Products Co. v. Widiger, 186 Ind. 227, 229, 114 N.E. 457, 458 (1916), upheld a jury instruction that defined “preponderance of the evidence” as the greater weight of the evidence, stating, “In our opinion this is a fair statement of the law relating to what constitutes a preponderance of the evidence.” *See also Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 361 (Ind. 1982) (citing *Great Atlantic & Pacific Tea Co. v. Custin*, 214 Ind. 54, 61, 14 N.E.2d 538 (1938)) (“preponderance of the evidence,” when used with respect to determining whether or not one’s burden of proof has been met, simply means the “greater weight of the evidence.”).

511 Clear and Convincing Evidence

Proof by clear and convincing evidence is a higher standard of proof than proof by the greater weight of the evidence.

Proof of a claim by clear and convincing evidence means that the facts supporting that claim are highly probable.

In criminal law we require that crimes be proved by an even higher standard of proof called beyond a reasonable doubt. We do not use this higher standard in civil cases, but the concept of beyond a reasonable doubt helps us to understand the concept of clear and convincing evidence. Clear and convincing evidence is a higher standard than the greater weight of the evidence, but a lower standard than beyond a reasonable doubt.

Comments

Indiana Jury Rule 20(a)(2) requires a trial court to give a preliminary instruction on the applicable burden or burdens of proof. This means that the trial court should give either this instruction or the instruction on the greater weight of the evidence, or both.

Clear and convincing evidence is an intermediate standard of proof greater than a preponderance of the evidence and less than proof beyond a reasonable doubt. It requires the existence of a fact to be highly probable. *Lazarus Dep't Store v. Sutherlin*, 544 N.E.2d 513 (Ind. Ct. App. 1989). *J.C.C. v. State*, 897 N.E.2d 931, 934-935 (Ind. 2008).

The clear and convincing evidence standard is used, for example, in punitive damages and certain defamation claims. *See, e.g., Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982); Ind. Code § 34-51-3-2; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

513 Direct Evidence & Circumstantial Evidence

The parties in this case may prove a fact by one of two types of evidence—direct evidence or circumstantial evidence.

Direct evidence is direct proof of a fact. Circumstantial evidence is indirect proof of a fact.

For example, direct evidence that an animal ran in the snow might be the testimony of someone who actually saw the animal run in the snow. On the other hand, circumstantial evidence that an animal ran in the snow might be the testimony of someone who only saw the animal’s tracks in the snow.

It is not necessary that any fact be proved by direct evidence. You may consider both direct evidence and circumstantial evidence as proof.

515 Credibility of Witnesses—Weighing Evidence

You alone are the judges of the evidence, including the credibility of witnesses. Credibility means believability. A credible witness is a witness whose testimony you believe.

In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe what he or she has testified about; the manner and conduct of the witness while testifying; any interest, bias, or prejudice the witness may have; any relationship the witness may have with other witnesses or interested parties; and the reasonableness of the witness's testimony considered in the light of all the evidence you have heard.

Assume that each witness has testified truthfully. If you find conflicts in the evidence, reconcile those conflicts, if you can, based on the assumption that each witness has testified truthfully.

Do not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony that you cannot reconcile, decide what testimony you believe and what testimony you disbelieve.

In deciding what or whom you believe, you should use your own knowledge, experience, and common sense gained from day-to-day living.

Comments

Indiana Jury Rule 20(a)(3) requires a trial court to give a preliminary instruction on the credibility of witnesses and the manner of weighing the testimony to be received.

Indiana Trial Rule 51(A) requires a preliminary instruction on these topics. This rule provides that the court may on its own motion, or shall on any party's request, re-read any or all of the preliminary instructions. In light of this rule, the Committee recommends that this instruction be read again as part of the final charge to the jury.

517 Impeachment of Witness—Prior Inconsistent Acts, Statements, Testimony

A. Parties may attack the credibility of a witness by showing that the witness [made a statement][or][behaved in a manner] inconsistent with the witness's testimony.

You may consider the fact that the witness [spoke][acted] inconsistently with his testimony in this case *only* to determine the weight you will give to that witness's testimony given during this trial.

B. [However,] if a witness testified inconsistently *under oath* either in this case or in any other case or court proceeding, you may *also* consider *the content* of the witness's prior inconsistent statement as evidence in this case.

Comments

Subpart A may be given during trial at the time when the impeaching evidence is admitted if a request for a limiting instruction is made, and should then be followed by Instruction No. 527 in the final charge. As discussed in the Comments to Instruction No. 527, it may be necessary to give a special limiting instruction on this subject in the final instructions.

Subpart B addresses prior inconsistent testimony under oath as substantive evidence. *See* Ind. Evidence Rule 801(d)(1)(A) (a prior statement of a witness is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition); *see also* *Modesitt v. State*, 578 N.E.2d 649 (Ind. 1991), (holding a prior statement is admissible as substantive evidence only if the declarant testifies at trial and is subject to cross-examination concerning the statement, and (a) the statement is inconsistent with declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, deposition or other proceeding, or (b) the statement was consistent with the declarant's testimony and offered to rebut an express or implied charge of recent fabrication, improper influence or motive, or (c) one of identification of a person made after perceiving the person).

Subpart B should be omitted entirely if there is no evidence of a prior inconsistent statement *under oath*. The bracketed "however" should only be used in subpart B if both subparts A and B are used. The "A" and "B" designating the subparts are for identification only, and should be omitted when the instruction is given to the jury.

519 Impeachment of Witness—Proof of Conviction of Crime

You may consider evidence that a witness has been convicted of a crime, along with all the other evidence in this case, in deciding the witness's credibility and the weight you will give [his][her] testimony.

Comments

This instruction may be given during trial when prior conviction impeachment evidence is admitted and a request for a limiting instruction is made at that time. Under those circumstances, it is recommended that Instruction No. 527 also be given in the final charge. However, as discussed in the Comments to Instruction No. 527, it may be necessary instead to give this instruction itself in the final charge.

Only crimes of dishonesty or false statement, or certain "infamous crimes," are admissible to impeach a witness' credibility. *See Ashton v. Anderson*, 258 Ind. 51, 279 N.E.2d 210 (1972). For purposes of impeachment, the "infamous crimes" listed in *Ashton* include convictions for attempts of those same crimes. *Adams v. State*, 542 N.E.2d 1362 (Ind. Ct. App. 1989).

It has been held that a limiting instruction on such evidence is mandatory upon request in a criminal action, *Jarver v. State*, 265 Ind. 525, 356 N.E.2d 215 (1976), and the rule applies as well in a civil case with perhaps less severe consequences for error, *see Plan-Tec, Inc. v. Wiggins*, 443 N.E.2d 1212 (Ind. Ct. App. 1983).

521 [Opinion][Expert][Skilled] Witness

Generally, a witness may not express an opinion. However, a witness may be permitted to express an opinion because of [his][her] knowledge, skill, experience, training, or education.

Judge opinion testimony in the same manner that you judge other testimony. In deciding how much weight to give opinion testimony, you may also take into consideration:

- (1) the witness's skill, experience, knowledge, and familiarity with the facts of this case;
- (2) the reliability of the information supporting the witness's opinions; and
- (3) the reasons for the opinions.

Comments

This instruction is patterned after the language found in Indiana (Criminal) Pattern Jury Instruction No. 12.29 and Ind. Evidence Rule 702(a).

"[A]n expert witness may express his opinion regarding a hypothetical question if the following foundational prerequisites are satisfied: (1) the expert's ability to give such an opinion must be established through testimony showing he has the requisite knowledge, skill, education, or experience on which to base the opinion; and (2) there must be a proper evidentiary foundation supporting the facts that are included in the hypothetical question." *Lasater v. Lasater*, 809 N.E.2d 380, 394 (Ind. Ct. App. 2004) (citing *Johnson v. State*, 699 N.E.2d 746, 750 (Ind. Ct. App. 1998)).

While the Committee replaced the bracketed paragraph in the previous version of this instruction on hypothetical questions ("The attorneys have asked questions in which the expert witness was to assume that certain facts were true and to give an opinion based upon such assumptions. You must decide whether the assumed facts, upon which the expert based the opinion, are true. If you decide any assumed fact is not true, then you should decide what effect, if any, that has on the expert's opinion.") with subpart 2 ("the reliability of the information supporting the witness's opinions"), the Committee believes this instruction (as it is currently written) is still applicable to hypothetical questions. Parties may also want to address the issue of hypothetical questions in closing argument.

523 Agreed/Stipulated Facts

The parties in this case have agreed that certain facts are true. You must accept these facts as true: *[insert agreed facts]*.

Comments

Except for minor changes, this instruction adopts the language found in Indiana (Criminal) Pattern Jury Instruction No. 12.39.

This instruction should be given at the time of the stipulation and also as part of the concluding instructions.

525 Depositions

A party may present testimony by way of a written or videotape [deposition][transcript of testimony].

[A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and the lawyer for each party may ask questions. A court reporter is present and records the questions and answers.]

[A transcript is the sworn testimony of a witness from a prior trial or legal proceeding.]

Evaluate this testimony using the same rules you apply to the testimony of other witnesses.

Comments

This instruction is patterned after the language found in Indiana (Criminal) Pattern Jury Instruction No. 12.43. This instruction should be given as a preliminary instruction or at the time the event occurs. It may also be given as a final instruction.

Concluding Instructions

527 Evidence Admitted for Limited Purposes

During the trial, I instructed you to consider certain evidence only for specific, limited purposes. You must consider that evidence only for those limited purposes.

Comments

Indiana follows “the rule of multiple admissibility” endorsed by Wigmore and McCormick: evidence that is admissible for one purpose is admissible, even if it might be excluded if offered for another purpose. The opponent of the evidence is protected, not by exclusion of the evidence, but by a limiting instruction to the jury to consider the evidence only for the limited, permissible purpose. R. Miller, *Indiana Evidence* § 105.101, 80–81 (1984).

Limiting instructions may be given when the evidence is being introduced or during the judge’s charge at the end of the case. It is preferable, however, to instruct the jury on the limited use of the evidence when it is admitted. *Purcell v. State*, 406 N.E.2d 1255 (Ind. Ct. App. 1980).

The reasons for this preference are that the instruction can be directed specifically at the evidence in question and can take effect before the jury has been accustomed to thinking of it in terms of the inadmissible purpose. Instructions given at the end of the case are more abstract, may apply to a number of items of evidence, and are buried in a mass of other instructions; all these features are likely to ensure that the later limiting instruction has little effect. The ideal method is, therefore, a specific instruction with respect to each item admitted for a limited purpose when it is admitted, followed by a general instruction at the end of the case reminding the jurors that some evidence may be used only for limited purposes. C. Wright and K. Graham, 21 *Federal Practice and Procedure* 332 (1977).

The court is not required to give a limiting instruction unless one is requested. *See, e.g., Landrum v. State*, 428 N.E.2d 1228 (Ind. 1981); *Ridgeway v. State*, 422 N.E.2d 410 (Ind. Ct. App. 1981). Clearly this rule applies when there was no request both at the time the evidence was admitted and when final instructions were submitted. But Judge Miller notes that in cases where failure to request a limiting instruction resulted in waiver of any error in failing to give one, “it is not clear whether the waiver lay in the failure to request a final instruction, or in the failure to request an admonition when the evidence was admitted.” R. Miller, *Indiana Evidence* § 105.101 at 84.

It is not error for a court to give a limiting instruction *sua sponte*. *Mitchell v. State*, 535 N.E.2d 498, 501 (Ind. 1989); *see also* Fed. R. Evid. 105; C. Wright and K. Graham, 21 *Federal Practice and Procedure* at 331.

Wright and Graham observe, however, that under the Federal Rule a party may delay his request for a limiting instruction for strategic advantage: “[t]he opponent of the evidence may not wish to have it highlighted by a limiting instruction when it is received, but may be forced to request a limiting instruction when the proponent of the evidence attempts to use it for some forbidden purpose.” C. Wright and K. Graham, 21 *Federal Practice and Procedure*, *supra*, at 329. If such a tactic is permissible under the Indiana Rule, the judge should not interfere with counsel’s conduct of the case, even if counsel’s failure to request the instruction when the

evidence is admitted is not by conscious design.

Finally, if a trial judge erroneously refused a request for a limiting instruction at the time the evidence was admitted, he or she can cure that error with a final instruction.

Purcell, 406 N.E.2d 1255.

529 Inadmissible Evidence

You must not consider testimony or exhibits that were not admitted into evidence.

531 Collateral Source Evidence

If you find that [plaintiff] is entitled to recover, you must consider evidence of [worker's compensation][name other collateral source payment] benefits [plaintiff] received and whether [plaintiff] must repay those benefits.

Any amount [plaintiff] must repay for those benefits will be paid out of any verdict you award to [plaintiff] after this trial is over. Do not reduce your verdict by the amount of those benefits [plaintiff] must repay.

[Any amount (plaintiff) is not required to repay will not be paid out of any verdict you award to (plaintiff) after this trial is over. Therefore, in determining your verdict, reduce what you would otherwise award (plaintiff) by the amount of any benefits (plaintiff) is not required to repay.]

Comments

For collateral source issues regarding medical expenses, see Instruction 703(5).

In *Travelers Indem. Co. of Am. v. Jarrells*, 927 N.E.2d 374 (Ind. 2010), the Indiana Supreme Court held that the Former Pattern Instruction No. 11.07 was confusing and should not be used in future trials. (Former Pattern Instruction No. 11.07 was based directly on the language of the collateral source statute, Ind. Code § 34-44-1-2.) The Supreme Court explained, “[B]y directing the jury to ‘consider’ the worker’s compensation benefits paid and also to ‘consider’ the obligation to repay, the instruction is less than clear about how the jury is to take these payments into consideration.” *Travelers*, 927 N.E.2d 374, at *11. In other words, should the jury deduct the amount of collateral source benefits from the amount it would otherwise award, or should it include the amount of those benefits in its verdict, so that the plaintiff can later repay the benefits out of the proceeds of the judgment?

The Supreme Court stated its interpretation:

If the jury is to consider evidence of collateral source payments such as worker’s compensation that the plaintiff is required to repay, the only plausible interpretation of these provisions is that the jury should include the amount of any collateral source payments that the plaintiff is required to repay in its award to the plaintiff. If, however, there is no evidence of an obligation to repay, then the jury should not include the amount of collateral source payments in its award. The defendant, therefore, is benefited by evidence of the collateral source payments, and the plaintiff gets the benefit of proof of obligation to repay.

Travelers, 927 N.E.2d 374, at *6–7. Instruction No. 531 is the Committee’s effort to resolve the confusion created by the statute by telling the jury how verdicts involving collateral source benefits will be interpreted, and what the jury is to do in determining its verdict.

While the statute also directs the jury to consider the cost a plaintiff paid for any benefits received, the Committee has removed reference to cost from the instruction. The collateral source statute prohibits the admission of evidence of insurance benefits for which the plaintiff or members of the plaintiff’s family have paid for directly, and most other collateral source benefits are paid for by someone other

than the plaintiff. (For example, worker's compensation benefits are paid for by the plaintiff's employer.) This Instruction should be modified if evidence of cost of benefits is admitted.

The collateral source statute, Ind. Code § 34-44-1-2 states:

In a personal injury or wrongful death action, the court shall allow the admission into evidence of:

- (1) proof of collateral source payments other than:
 - (A) payments of life insurance or other death benefits;
 - (B) insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly; or
 - (C) payments made by:
 - (i) the state or the United States; or
 - (ii) any agency, instrumentality, or subdivision of the state or the United States;

that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought;

- (2) proof of the amount of money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received; and
- (3) proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family.

533 Insurance Not to Be Considered

In deciding this case, you must not consider or speculate about whether [either][any] party has insurance.

Comments

Evidence that a person was or was not insured is inadmissible on the issue of whether the person acted negligently or otherwise wrongfully. Ind. Evid. R. 411. This rule does not require the exclusion of evidence of insurance when offered for another purpose, such as proof of agency, ownership, control, or bias or prejudice of a witness. Ind. Evid. R. 411; *see also Rausch v. Reinhold*, 716 N.E.2d 993, 1002 (Ind. Ct. App. 1999); *see also* Ind. Code § 34-44-1-2 (collateral source rule).

Concluding
Instructions

535 Failure to Produce Evidence (Spoliation)

If a party fails to [testify about facts][produce a witness][produce documents] under the party's exclusive [knowledge][control], you may conclude that the [testimony the witness could have given][documents the witness could have produced] would have been unfavorable to the party's case.

Comments

The Committee believes that this instruction should only be given if the party requesting it gave the opposing party an opportunity to respond to a claim that he or she failed to produce evidence. In addition, some Indiana cases also appear to require that the party against whom the instruction is requested actively suppressed the evidence. *See, e.g., Cahoon v. Cummings*, 734 N.E.2d 535, 545 (Ind. 2000) (“ ‘In Indiana, the exclusive possession of facts or evidence by a party, coupled with the suppression of the facts or evidence by that party, may result in an inference that the production of the evidence would be against the interest of the party which suppresses it.’ ”) (quoting *Porter v. Irvin's Interstate Brick & Block Co.*, 691 N.E.2d 1363, 1364–65 (Ind. Ct. App. 1998); citing *Great American Tea Co. v. Van Buren*, 218 Ind. 462, 467, 33 N.E.2d 580, 581 (1941)).

This rule has limited application in the case of an absent witness. If a party has exclusive power to produce a material witness and fails to do so, it may give rise to an inference that the witness would testify unfavorably to the party who had the exclusive control. *Breese v. State*, 449 N.E.2d 1098 (Ind. Ct. App. 1983); *Bowes v. Lambert*, 114 Ind. App. 364, 51 N.E.2d 83 (1943); *Public Sav. Ins. Co. v. Greenwald*, 68 Ind. App. 609, 118 N.E. 556 (1918); *Godwin v. De Motte*, 64 Ind. App. 394, 116 N.E. 17 (1917).

537 Judicial Notice of Mortality Tables

[Plaintiff] has asked you to award money based on [his][her][plaintiff's decedent's] life expectancy.

According to the _____ Mortality Table, the life expectancy of a [male][female] person _____ years of age is _____ years.

This is evidence you may consider in determining the amount of money to award, if any.

Mortality tables are merely estimates of life expectancy. They are based on statistical averages of the remaining length of life of all persons in our country of a given age and sex.

In considering the life expectancy of [plaintiff][plaintiff's decedent], you may evaluate all facts and circumstances that bear on the life expectancy of [plaintiff][plaintiff's decedent], including the mortality table and [his][her] occupation, health history, state of health [at time of death], and habits.

Comments

See *Stauffer v. Lothamer*, 419 N.E.2d 203, 216 (Ind. Ct. App. 1981), questioned on other grounds by *Harrison v. State*, 575 N.E.2d 642, 648 (Ind. Ct. App. 1991).

Concluding
Instructions

539 Consolidated Actions—Two or More Plaintiffs

The claims of each plaintiff are separate and distinct. [Their claims will be tried together for efficiency.] You must decide each claim separately. Unless I instruct you otherwise, my instructions apply to [both][all] plaintiffs.

Comments

The consolidation and trial of multiple actions are governed by Ind. Trial Rule 42(A), which provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

When actions involving a common question of law or fact are pending before a court, economy of time, money, and effort requires, if practicable, that the entire controversy be determined by one trial. *Arnold v. Dirrim*, 398 N.E.2d 426, 436 (Ind. Ct. App. 1979).

Consolidation is not a right, and whether to consolidate is within the sound discretion of the trial court. *Kruse, Kruse & Miklosko v. Beedy, Inc.*, 170 Ind. App. 373, 353 N.E.2d 514 (1976). A party must show prejudice from the consolidation to establish reversible error. *Kindred v. Ind. Dep't. of Child Servs.*, 136 N.E.3d 284, 292 (Ind. Ct. App. 2019); *Bodem v. Bancroft*, 825 N.E.2d 380 (Ind. Ct. App. 2005).

While Ind. Trial Rule 42(A) authorizes consolidation of cases pending before the same court, it does not authorize the transfer of actions from one court to another for consolidation. *Figg & Muller Eng'rs, Inc. v. Petruska*, 477 N.E.2d 968 (Ind. Ct. App. 1985); *Kindred v. State*, 540 N.E.2d 1161 (Ind. 1989).

541 Two or More Defendants

There are [two][*number greater than two*] defendants in this action. [The claims against them will be tried together for efficiency.] You must consider the claims against and any defenses raised by each defendant separately. Unless I instruct you otherwise, my instructions apply to [both][all] defendants.

Comments

This instruction will eliminate the need to give separate and repetitious instructions on behalf of each defendant where there are similar issues.

The Indiana Rules of Procedure Trial Rules envision a number of situations in which a single lawsuit may involve two or more defendants. Under T.R. 20(A)(2):

All persons may be joined in one [1] action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of, or arising out of, the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Indiana Trial Rule 19(A) establishes two tests for determining whether a person is an indispensable party to a lawsuit. The failure to name a party who meets one of the tests set forth by T.R. 19(A) permits the court to order that he or she be added as a party if the person is subject to process, or that the action be dismissed if the person is not, or that the action be allowed to continue in the person's absence. In the exercise of this discretion, the court is required to consider the four factors enumerated in T.R. 19(B).

Persons having claims against the plaintiff in a lawsuit may be joined as defendants and required to interplead when the plaintiff is or may be exposed to double or multiple liability. T.R. 22.

In addition, T.R. 17.1 provides that the state may be named as a defendant in any action involving real property when it appears that the state has or claims to have a lien upon or an interest in such real estate. The rule is meant to apply to actions to foreclose a mortgage or other lien on real estate, to subject any real estate to sale, or to partition or quiet title to real estate. T.R. 17.1.

For more information on joint liability, see the comments to Instruction No. 323.

For a general analysis of joinder see *Pivarnik v. Northern Ind. Pub. Serv. Co.*, 636 N.E.2d 131, 137-139 (Ind. 1994); *McCoy v. Like*, 511 N.E.2d 501 (Ind. Ct. App. 1987); *Elkhart v. Middleton*, 356 N.E.2d 207 (Ind. 1976).

543 Jury Deliberations

To return a verdict, all of you must agree to it. In other words, it must be unanimous. Each of you must decide the case for yourself, but only after considering and discussing the evidence with each other. You should try to agree on a verdict, if you can do so without compromising your individual judgment. Do not hesitate to re-examine your own views and change your mind if you believe you are wrong. But do not give up your honest belief just because the other jurors may disagree, or just to end the deliberations.

Comments

Indiana Jury Rules 28 (Assisting Jurors at an Impasse), 29 (Separation During Deliberation), and 30 (Judge to Read the Verdict) address jury deliberation procedures.

For a discussion on options trial courts can employ to provide assistance to enable a deliberating jury to resolve difficulties, see *Tincher v. Davidson*, 762 N.E.2d 1221 (Ind. 2002). In *Tincher*, the trial court believed it was limited to telling the jury that the verdict and calculation forms were inconsistent and directing them to re-read the instructions and to complete a new set of verdict/calculations forms. The trial court ultimately declared a mistrial after repeated calculation inconsistencies in verdict forms returned by the jury. The Indiana Supreme Court concluded that trial courts are not so limited and encouraged trial courts to employ other and creative approaches to assist and enable juries to resolve difficulties pursuant to Ind. Code § 34-36-1-6 and Indiana Jury Rule 28. Under appropriate circumstances and with advance consultation with parties and opportunity to voice objections, a trial court may, for example, (1) directly seek further information or clarification from the jury about its concerns, (2) directly answer a jury's question (either with or without directing the jury to reread the instructions), and/or (3) allow counsel to address briefly the jury's question in short supplemental arguments to the jury. *Tincher*, 762 N.E.2d at 1224. The Supreme Court also noted that under the Comparative Fault Act, Ind. Code § 34-51-2-13, a trial court must at least assist juries in resolving inconsistencies between the verdict and the determination of total damages and percentage of fault by informing them of the inconsistencies, directing the jury to resume deliberation to correct the inconsistencies, and instructing the jury it may change any portion or portions of the verdict to correct the inconsistencies. *Tincher*, 762 N.E.2d at 1225-26.

See also, Instruction No. 549.

544 Technology Used to Present Exhibits at Trial

In reviewing exhibits, if you need the [equipment][technology] used to present an exhibit at trial, please notify the bailiff, and I will provide it.

Comments

See generally *Arlton v. Schraut*, 936 N.E.2d 831, 840 (Ind. Ct. App. 2010). The Court did acknowledge, however, limitations on technology used during deliberations:

We recognize that giving the jury access to a computer could raise unintended issues, such as who needs to provide the computer or whether the jury could misuse the computer to access extraneous information. We do not presume to set forth one all-encompassing rule regarding providing the jury access to digital evidence. The solutions could be as simple as what was done in [United States v.] *Rose*[], 522 F.3d 710 (6th Cir. 2008)], *i.e.*, transforming the evidence into a medium that is accessible without a computer. Or the court or parties could provide the jury with a “clean” computer, *i.e.*, one that contains no other information and which has no ability to access the Internet. See, *e.g.*, *United States v. Jackson*, 2008 U.S. Dist. LEXIS 103008, 2008 WL 5384571 (S.D. Ill. 2008) (court permitted its director of information technology to take a computer, which had no internet access and could only be used to view the admitted digital evidence, into the jury room and show the jury how it could be used to access the evidence). Ideally, these issues should be dealt with well before deliberations begin, even before trial, so that the trial court does not have to scramble just before deliberations trying to find a way to let the jury access admitted digital evidence. But whatever solution is agreed upon or decided upon is better than admitting digital evidence, and then giving the jurors no means of accessing it. Digital evidence should not be “relegated to muteness.” *Rose*, 522 F.3d at 715.

Arlton v. Schraut, 936 N.E.2d 831, 840 (Ind. Ct. App. 2010) (footnote omitted).

545 Jury Management

When you return to the jury room, select one of your members as presiding juror to manage the deliberations.

No one will be allowed to hear your discussions and no recording will be made of what you say. The bailiff is available to assist you with personal needs, but cannot answer any questions about the case.

If you have any questions for me, you must put them in writing and give them to the bailiff, and I will respond as the law permits. You may be able to find answers to your questions by reviewing my written instructions and all the evidence.

If at any time you are not all together, or if you are outside the jury room, you must not talk about the case among yourselves or with anyone else.

I am giving you forms of possible verdicts. The presiding juror must sign and date the verdict[s] to which you all agree. Do not sign any verdict form for which there is not unanimous agreement.

When you have agreed upon [a] verdict[s], inform the bailiff. When the parties are present, the bailiff will bring you back to court. Bring all verdict forms, signed and unsigned, with you at that time. I will read the verdict aloud. Each of you may be asked if it is your verdict. Otherwise, you are under no obligation to discuss your verdict or deliberations with anyone.

Comments

This instruction is an adaptation of the language found in Indiana (Criminal) Pattern Jury Instruction No. 13.23.

Although the statute does not require the jury to put the date on the verdict, *see* Ind. Code § 34-36-1-9, it is the better practice to ask the jury to do so.

The court may authorize juror trial books that may contain given instructions, information regarding the anticipated trial schedule, witness lists, and copies of admitted exhibits. Ind. Jury Rule 23.

The trial court is required to read appropriate final instructions to the jury and provide each juror with written instructions before the court reads them; jurors shall retain the written instructions during deliberations. Ind. Jury Rule 26. Juror instructions must be a “clean copy” with no indication of who submitted the instruction.

Indiana Jury Rules 28 (Assisting Jurors at an Impasse), 29 (Separation During Deliberation), and 30 (Judge to Read the Verdict) address jury deliberation procedures. *See also* Ind. Code §§ 34-36-1-5 (separation of jury during trial or deliberations), 34-36-1-6 (jury questions during deliberations).

For a discussion on options trial courts can employ to provide assistance to enable a deliberating jury to resolve difficulties, *see Tincher v. Davidson*, 762 N.E.2d 1221 (Ind. 2002). In *Tincher*, the trial court believed it was limited to telling the jury that the verdict and calculation forms were inconsistent and directing them to re-read the instructions and to complete a new set of verdict/calculations forms. The trial court

ultimately declared a mistrial after repeated calculation inconsistencies in verdict forms returned by the jury. The Indiana Supreme Court concluded that trial courts are not so limited and encouraged trial courts to employ other and creative approaches to assist and enable juries to resolve difficulties pursuant to Ind. Code § 34-36-1-6 and Indiana Jury Rule 28. Under appropriate circumstances and with advance consultation with parties and opportunity to voice objections, a trial court may, for example, (1) directly seek further information or clarification from the jury about its concerns, (2) directly answer a jury's question (either with or without directing the jury to reread the instructions), and/or (3) allow counsel to address briefly the jury's question in short supplemental arguments to the jury. *Tincher*, 762 N.E.2d at 1224. The Supreme Court also noted that under the Comparative Fault Act, Ind. Code § 34-51-2-13, a trial court must at least assist juries in resolving inconsistencies between the verdict and the determination of total damages and percentage of fault by informing them of the inconsistencies, directing the jury to resume deliberation to correct the inconsistencies, and instructing the jury it may change any portion or portions of the verdict to correct the inconsistencies. *Tincher*, 762 N.E.2d at 1225-26.

If a judge is unable to answer a question during deliberations, the Committee suggests language similar to this: I have reviewed the question that you have presented. The law does not permit me to answer the question. Please re-read my instructions, consider all the evidence, and continue to deliberate.

547 Duty of Alternate Juror

[Mr.][Ms.][*name of alternate juror*], you have been selected as an alternate juror.

Your duties are the same as those of the regular jurors, except you must not participate in the deliberations or voting of the jury—unless I direct you to do so.

The presiding juror of the jury shall prevent alternate jurors from deliberating or voting with the jury. The presiding juror shall promptly report any violation of this instruction to me.

Comments

The decision to allow the alternate juror to retire with the jury is in the sound discretion of the trial judge. *Johnson v. State*, 267 Ind. 256, 259–60, 369 N.E.2d 623, 625 (1977). This instruction should be given if the alternate juror is allowed to retire with the jury.

Alternates are permitted to discuss the case before deliberations begin. “[J]urors, including alternates, are permitted to discuss the evidence among themselves in the jury room during recesses from trial when all are present, as long as they reserve judgment about the outcome of the case until deliberations commence.” Ind. Jury Rule 20(a)(8).

549 Inconsistent Jury Verdicts

Members of the jury, the verdict you have returned must be corrected, because [it contradicts itself][it is inconsistent with my instructions][the total percentage of fault does not equal 100 percent][the amount awarded is inconsistent with your findings][other].

You must now return to the jury room, to reconsider and correct the verdict.

You may change any portion of the verdict to correct it. Each of you is also free to change your vote.

Once you have corrected your verdict, please inform the bailiff, who will return you to court.

Comments

Because of the multitude of errors that could render a verdict unacceptable, a specific model instruction on the correction of the verdict is impossible. Any model instruction must necessarily leave room for amendment to fit the particular circumstances. As such, this instruction acts primarily as a guideline in framing such an instruction.

It is the court's duty to order the jury to correct a verdict faulty in either substance or form. The jury is to amend the verdict, and any juror can change his or her mind, until the jury is discharged by the court. *McFarland v. State*, 579 N.E.2d 610 (Ind. 1991); *Limeberry v. State*, 223 Ind. 622, 63 N.E.2d 697 (1945).

Ind. Jury Rule 28 addresses assistance to jurors at an impasse:

If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate.

Henri v. Curto, 908 N.E.2d 196, 205 (Ind. 2009), explains the application of Ind. Jury Rule 28:

Jury Rule 28 was adopted to afford trial courts greater flexibility in dealing with jury impasses. *See generally Ronco v. State*, 862 N.E.2d 257 (Ind. 2007). Before Rule 28, a trial court was required to reread all instructions in response to a jury question. *Id.* at 259. With the adoption of Rule 28, this Court intended to encourage trial judges to fashion creative, resourceful, and sensible responses to individualized case circumstances to assist jurors confronted with apparent impasse. *See Tincher v. Davidson*, 762 N.E.2d 1221, 1224 (Ind. 2002). Judicial resort to Rule 28 techniques is not mandatory, however. The rule merely "confers discretionary authority." *Ronco*, 862 N.E.2d at 260.

Jury Rule 28 only confers discretionary authority for "further proceedings" at moments of "impasse," not merely when jurors have a question. *Ronco*, 862 N.E.2d at 260. Indiana Code § 34-36-1-6, on the other hand, empowers a trial court to respond to either juror disagreement over testimony or the jury's desire "to be

informed as to any point of law arising in the case.” The trial court must respond to a jury question regarding a point of law involved in the case, whereas other questions should prompt caution lest the judge exercise undue influence. *Foster v. State*, 698 N.E.2d 1166, 1170 (Ind. 1998). As a general matter, the policy of greater flexibility in jury management reflected in the Jury Rules informs actions taken under Ind. Code § 34-36-1-6. *Ronco*, 862 N.E.2d at 260.

For a discussion on options trial courts can employ to provide assistance to enable a deliberating jury to resolve difficulties, see *Tincher v. Davidson*, 762 N.E.2d 1221 (Ind. 2002). In *Tincher*, the trial court believed it was limited to telling the jury that the verdict and calculation forms were inconsistent and directing them to re-read the instructions and to complete a new set of verdict/calculations forms. The trial court ultimately declared a mistrial after repeated calculation inconsistencies in verdict forms returned by the jury. The Indiana Supreme Court concluded that trial courts are not so limited and encouraged trial courts to employ other and creative approaches to assist and enable juries to resolve difficulties pursuant to Ind. Code § 34-36-1-6 and Indiana Jury Rule 28. Under appropriate circumstances and with advance consultation with parties and opportunity to voice objections, a trial court may, for example, (1) directly seek further information or clarification from the jury about its concerns, (2) directly answer a jury’s question (either with or without directing the jury to reread the instructions), and/or (3) allow counsel to address briefly the jury’s question in short supplemental arguments to the jury. *Tincher*, 762 N.E.2d at 1224. The Supreme Court also noted that under the Comparative Fault Act, Ind. Code § 34-51-2-13, a trial court must at least assist juries in resolving inconsistencies between the verdict and the determination of total damages and percentage of fault by informing them of the inconsistencies, directing the jury to resume deliberation to correct the inconsistencies, and instructing the jury it may change any portion or portions of the verdict to correct the inconsistencies. *Tincher*, 762 N.E.2d at 1225–26.

Before the Jury Rules were promulgated, the generally accepted procedure in answering a jury’s question was to reread all instructions to avoid emphasizing any particular point and not to qualify, modify, or explain instructions in any way. *Riley v. State*, 711 N.E.2d 489, 493 (Ind. 1999). See *Powell v. State*, 769 N.E.2d 1128 (Ind. 2002). This procedure was presumably created because jurors did not have a written copy of the instructions. Now that they have a written copy, it is no longer required. See Indiana Jury Rules 20(c) and 26.

See also, Instruction No. 543.

CHAPTER 700

DAMAGES

SYNOPSIS

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A. General

701 Damages—Guess or Speculation

Base your decision on the evidence and not on guess or speculation. However, damages need not be proven to a mathematical certainty.

Comments

See, e.g., *Dee v. Becker*, 636 N.E.2d 176, 178 (Ind. Ct. App. 1994) (“Damages for pain and suffering are of necessity a jury question which may not be reduced to fixed rules and mathematical precision.”).

703 General Elements of Damages

If you decide from the greater weight of the evidence that [defendant] is liable to [plaintiff], then you must decide the amount of money that will fairly compensate [plaintiff].

In deciding the amount of money you award, you may consider:

- (1) the nature and extent of the [injury][injuries], and the effect of the [injury-][injuries] on the [plaintiff]'s ability to function as a whole person;
- (2) whether the [injury][injuries][is][are] temporary or permanent;
- (3) the value of [lost time][lost earnings][and][loss or impairment of earning capacity];
- (4) the physical pain and mental suffering [plaintiff] has experienced [and will experience in the future] as a result of the [injury][injuries];
- (5) the reasonable value of necessary medical care, treatment, and services plaintiff incurred [and will incur in the future] as a result of the [injury][injuries];
- (6) the aggravation of a pre-existing [injury][disease][or][condition];
- (7) the [disfigurement][and][or][deformity] resulting from the [injury][injuries]; and
- (8) the life expectancy of [plaintiff].

Comments

(1) Nature and Extent of Injury

In considering the question of damages, the court or jury in personal injury actions may consider the nature and extent of the injury and the effect of the injury on the person's ability to function. *Canfield v. Sandock*, 563 N.E.2d 1279 (Ind. 1990).

The court or jury may consider life expectancy of the individual prior to the accident in determining the extent of the injury. *Dallas & Mavis Forwarding Co. v. Liddell*, 126 Ind. App. 113, 126 N.E.2d 18 (1955).

In personal injury cases, instead of instructing the jury to consider the "loss of quality and enjoyment of life," the jury should be instructed that they may consider "the nature and extent of the plaintiff's injury, and the effect of the injury itself on the plaintiff's ability to function as a whole person." *Canfield*, 563 N.E.2d at 1282; *Marks v. Gaskill*, 563 N.E.2d 1284 (Ind. 1990); see also *Frito-Lay, Inc. v. Cloud*, 569 N.E.2d 983 (Ind. Ct. App. 1991) (holding it is error to instruct the jury on the loss of quality and enjoyment of life as an element of damages separate from other elements of damage).

(2) Injury—Permanent or Temporary

An instruction on damages caused for personal injuries should tell the jury to

consider the nature and extent of the injury, whether the injury was temporary or permanent, and whether the injury caused physical or mental suffering. *Indianapolis S. R. Co. v. Walton*, 29 Ind. App. 368, 64 N.E. 630 (1902).

Reasonable damages for injuries caused by negligence include compensation for bodily injuries and pain and suffering, plus past, present, and future expenses reasonably necessary to treatment, and all financial losses suffered, or to be suffered, as a result of an inability to engage in one's usual occupation. *Ritter v. Stanton*, 745 N.E.2d 828 (Ind. Ct. App. 2001).

(3) Loss of Earnings or Profits

The basic measure of damages for impairment of lost earning capacity is the difference between the amount which the plaintiff was capable of earning before the injury and the amount which he was capable of earning thereafter. *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145 (Ind. Ct. App. 1990); *State v. Totty*, 423 N.E.2d 637 (Ind. Ct. App. 1981).

Historically, many courts have recognized that this element of damage is comprised of two distinct sub-elements which are usually denominated: (1) loss of time, and (2) decreased earning capacity. *Rieth-Riley Constr. Co. v. McCarrell*, 163 Ind. App. 613, 325 N.E.2d 844, 848 (1975). Loss of time refers to the time which the plaintiff has lost prior to trial because of his injury; decreased earning capacity designates the time which probably will be lost after trial. *Rieth-Riley Constr. Co.*, 325 N.E.2d at 848. In both cases, the compensable element is time that belonged to the plaintiff that the injury took from him. *Rieth-Riley Constr. Co.*, 325 N.E.2d at 848.

A proper element of damages is impairment of earning capacity, which means impairment of ability to engage in one's vocation; this element is distinguishable from lost earnings. *Duchane v. Johnson*, 400 N.E.2d 193 (Ind. Ct. App. 1980). Impaired earning capacity involves more than mere proof of permanent injury and pain; the proponent must offer evidence of his inability to engage in his vocation. *Scott v. Nabours*, 156 Ind. App. 317, 320-21, 296 N.E.2d 438, 441 (1973). The basic measure of damages for impairment of lost earning capacity is the difference between the amount the plaintiff was capable of earning before the injury and the amount he is capable of earning thereafter. *Duchane*, 400 N.E.2d at 196-97. This element may be proven by expert and non-expert testimony. *Scott*, 296 N.E.2d at 441.

(4) Pain and Suffering

Reasonable damages for injuries caused by negligence include compensation for bodily injuries and pain and suffering, plus past, present, and future expenses reasonably necessary to treatment, and all financial losses suffered, or to be suffered, as a result of an inability to engage in one's usual occupation. *Ritter v. Stanton*, 745 N.E.2d 828 (Ind. Ct. App. 2001).

Damages for pain and suffering are a jury question that may not be reduced to fixed rules and mathematical precision. *Dee v. Becker*, 636 N.E.2d 176 (Ind. Ct. App. 1994).

For a discussion on the recovery of damages for emotional distress, *see* the commentary to Instruction No. 2911.

(5) Medical and Hospital Expenses

An injured plaintiff may recover the reasonable cost of necessary medical expenses. *Russell v. Neumann-Steadman*, 759 N.E.2d 234 (Ind. Ct. App. 2001); *Dee v. Becker*, 636 N.E.2d 176 (Ind. Ct. App. 1994). To recover for medical expenses, a plaintiff must prove that they were both reasonable and necessary. *Smith v. Syd's, Inc.*, 598 N.E.2d 1065 (Ind. 1992).

A plaintiff proves reasonableness by showing payment of the bills or testimony of a treating doctor and generally proves necessity through the testimony of medical experts. *Smith*, 598 N.E.2d at 1066.

Indiana Evidence Rule 413 provides that statements of charges for medical, hospital or other health care expenses for diagnosis or treatment as the result of an injury are admissible and constitute *prima facie* evidence that charges are reasonable.

In a personal injury case where the amount of medical expenses plaintiff actually paid was discounted from the amount originally billed because of arrangements between plaintiff's health insurance company and medical providers, the discounted amount may be used to determine the reasonable value of medical services, but only to the extent that amount may be introduced without referencing insurance. *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009) (citing Ind. Code § 34-44-1-2; Ind. Evid. R. 413); *see also Butler v. Indiana Dep't of Ins.*, 904 N.E.2d 198 (Ind. 2009) ("[U]nder the statute governing actions for the wrongful death of unmarried adult persons with no dependents, Ind. Code § 34-23-1-2 (1999). *Stanley v. Walker* also applies to all discounts regardless of whether they are negotiated or mandated. In *Patchett v. Lee*, 60 N.E.3d 1025 (Ind. 2016) the Indiana Supreme Court held that *Stanley v. Walker* also applies equally to discounted amounts paid by governmental payors and accepted by medical providers. Indiana continues to chart a middle course by admitting billed charges and accepted amounts as evidence of the reasonable value of medical and hospital expenses.

Future expenses for medical treatment are a proper element of damages. *Indianapolis S. R. Co. v. Ray*, 167 Ind. 236, 78 N.E. 978 (1906); *Nappanee v. Ruckman*, 7 Ind. App. 361, 34 N.E. 609 (1893).

An injured child may recover the reasonable expense of necessary medical care, treatment, and services by suing in his own name, whether he paid portions of such expenses or not. *Scott County Sch. Dist. v. Asher*, 263 Ind. 47, 324 N.E.2d 496 (1975); *Dee v. Becker*, 636 N.E.2d 176 (Ind. Ct. App. 1994).

(6) Aggravation of Previous Injury or Disease

A defendant takes the injured person as he finds her or him, and the tortfeasor is not relieved from liability merely because an injured party's preexisting physical condition makes him or her more susceptible to injury. *Bolin v. Wingert*, 764 N.E.2d 201 (Ind. 2002).

A defendant is ordinarily liable for the aggravation or exacerbation of a preexisting

condition, but not for the condition as it was. *Alexander v. Scheid*, 726 N.E.2d 272 (Ind. 2000); *Dunn v. Cadiente*, 516 N.E.2d 52 (Ind. 1987); *Johnson v. Bender*, 174 Ind. App. 638, 369 N.E.2d 936 (1977); *National Dairy Products Corp. v. Grant*, 143 Ind. App. 464, 241 N.E.2d 275 (1968) (aggravation of preexisting injury by disease).

Instruction Nos. 926 (comparative fault) and 1122 (common law negligence) on preexisting and post-incident conditions should also accompany this Instruction.

(7) Disfigurement or Deformity

Ritter v. Stanton, 745 N.E.2d 828 (Ind. Ct. App. 2001) (compensatory damages were not excessive where the victim suffered massive injuries including injuries to sexual organs, loss of vision in one eye, and devastating bone infection leaving formerly active truck driver in a wheelchair, unemployable, and with one leg several inches shorter than the other).

(8) Life Expectancy

See *Stauffer v. Lothamer*, 419 N.E.2d 203, 216 (Ind. Ct. App. 1981), questioned on other grounds by *Harrison v. State*, 575 N.E.2d 642, 648 (Ind. Ct. App. 1991).

704 Pain and Suffering

[*Plaintiff*] does not have to present evidence of the dollar value of [his][her] pain, suffering, mental anguish, or [*insert other damage element for which evidence of monetary value is not required, such as disfigurement or deformity*]. These types of damages need not be proven to a mathematical certainty.

[*Plaintiff*] must prove the nature and extent of these types of damages, however. The dollar value, if any, of these damages is left to your good judgment.

Comments

An instruction on the monetary value of pain and suffering does not erroneously direct the jury to a certain result and is therefore permissible. *Johnson v. Mills*, 301 N.E.2d 205, 208 (Ind. Ct. App. 1973). Recovery for pain and suffering is permitted for every form of distress (past, present, and future) that is the natural and direct result of a physical injury, and while the monetary value must be established, a specific type of evidence is not required. *Grubbs v. United States*, 581 F. Supp. 536, 541–42 (N.D. Ind. 1984) (citing *Boston v. Chesapeake & Ohio Ry. Co.*, 61 N.E.2d 326 (Ind. 1945); *Mays v. Welsh*, 32 N.E.2d 701 (Ind. 1941); *Johnson v. Mills*, 301 N.E.2d 205 (Ind. Ct. App. 1973)); *see also Ridgeway v. Teshoian*, 699 N.E.2d 1156, 1158–59 (Ind. Ct. App. 1998) (giving an example of an instruction on monetary value of pain given at trial and not challenged on appeal).

705 Loss of Consortium—Loss of Spouse's Services

[*Consortium plaintiff*] has claimed that [*defendant*]'s actions caused [him][her] to lose the services, society, or companionship of [*plaintiff*]. [*Consortium plaintiff*] is allowed to bring this claim because [he][she] is married to [*plaintiff*]. You must not award any damages to [*consortium plaintiff*] if you did not award any damages to [*plaintiff*].

To establish this claim, [*consortium plaintiff*] must prove the following by the greater weight of the evidence:

- (1) [*Defendant*] is liable to [*plaintiff*];
- (2) [*Consortium plaintiff*] suffered the loss of services, society, or companionship of [*plaintiff*] because of the injury to [*plaintiff*]; and
- (3) [*Defendant*]'s negligence was the responsible cause of this loss.

If you decide from the greater weight of the evidence that [*defendant*] is liable to [*consortium plaintiff*], you must then decide the amount of money which will fairly compensate [him][her] for the reasonable value of the loss of services, society, or companionship of [*plaintiff*] and any loss that is reasonably certain to occur in the future.

Comments

Both a husband and a wife have an independent action for loss of consortium. *Troue v. Marker*, 253 Ind. 284, 252 N.E.2d 800 (1969).

If a spouse's cause of action for personal injury fails, the loss of consortium claim fails with it. *Durham v. U-Haul Int'l*, 745 N.E.2d 755 (Ind. 2001); *see also Board of Comm'rs v. Nevitt*, 448 N.E.2d 333 (Ind. Ct. App. 1983) (for an analysis of the relation between the claim of the injured spouse and the other's claim for loss of consortium).

Evidence of the value of the lost services and society of a spouse is unnecessary, and when their loss is shown, the assessment of compensation is left to the sound discretion of the trier of fact. *Hooper v. Preuss*, 109 Ind. App. 638, 37 N.E.2d 687 (1941).

Loss of consortium is more than loss of services, because loss of services does not expand to include intangible losses. *Forte v. Connerwood Healthcare, Inc.*, 745 N.E.2d 796 (Ind. 2001). An action for consortium rests in large part on the impairment of the sexual life and companionship. *Forte* at 796. Deprivation of conjugal relations may also cause mental anguish to both partners, which is an aspect of damages in a loss of consortium action. *Greene v. Westinghouse Elec. Corp.*, 573 N.E.2d 452 (Ind. Ct. App. 1991). Because loss of consortium includes intangible losses, the Committee recommends that judges giving this instruction also give Instruction No. 701 on damages not being based on guess or speculation.

707 Judicial Notice of Mortality Tables

[*Plaintiff*] has asked you to award money based on [his][her][*decedent's*] life expectancy. According to the _____ Mortality Table, the life expectancy of a [male][female] person _____ years of age is _____ years.

This is evidence you may consider in determining the amount of money to award, if any.

Mortality tables are merely estimates of life expectancy. They are based on statistical averages of the remaining length of life of all persons in our country of a given age and sex.

In considering the life expectancy of [*plaintiff*][*decedent*], you may evaluate all facts and circumstances that bear on the life expectancy of [*plaintiff*][*decedent*], including the mortality table and [his][her] occupation, health history, state of health [at time of death], and habits.

Comments

See Stauffer v. Lothamer, 419 N.E.2d 203, 216 (Ind. Ct. App. 1981), *questioned on other grounds by Harrison v. State*, 575 N.E.2d 642, 648 (Ind. Ct. App. 1991).

709 Impairment of Earning Capacity—Child Plaintiff

the value of [child's][lost time][lost earnings][and][loss or impairment of earning capacity] after [child] turn[s][ed] eighteen;

Comments

When the facts warrant it, this instruction should replace subpart (3) of Instruction 703.

Unless a minor child is emancipated, the parent (not the child) is entitled to recover for the child's lost time, wages, and earning capacity during the child's minority. *See Walker v. Gardner*, 266 F. Supp. 998 (S.D. Ind. 1967); *Allen v. Arthur*, 139 Ind. App. 460, 220 N.E.2d 658 (1966). The child (not the parent), however, may be entitled to damages based on expected loss of earning capacity after the child reaches age eighteen. L. S. Tellier, Annotation, *What Items of Damages on Account of Personal Injury to Infant Belong to Him, and What to Parent*, 32 A.L.R.2d 1060, 1068 (1953) And an unemancipated minor child (not the parent) can recover for bills he has paid and can recover for prospective medical expenses. *Scott County School Dist. v. Asher*, 263 Ind. 47, 324 N.E.2d 496 (1975).

711 Effects of Inflation—Damages to Be Incurred in Future

the effects, if any, of inflation and the depreciation or reduction in the value of money;

Comments

Inflation and depreciation are within the jury's "zone of discretion." *Richmond Gas Corp. v. Reeves*, 158 Ind. App. 338, 369, 302 N.E.2d 795, 815 (1973). This instruction should only be given if the evidence, including expert testimony, supports it.

When the facts warrant it, this Instruction should be inserted into Instruction 703.

713 Parent Claim for Loss of Child's Services

the value of any earnings, services, kindness, or attention [child] reasonably would have been expected to provide [his][her] parents up to the time [child] turn[s][ed] eighteen, and that the parents have now lost (or can reasonably be expected to lose) as a result of [defendant's][negligence][wrongful conduct];

Comments

A wrongful act resulting in the injury to a minor child gives rise to two causes of action, one in favor of the injured child for personal injuries inflicted, and the other in favor of the parent for loss of services. *Stott v. Stott*, 737 N.E.2d 854 (Ind. Ct. App. 2000). A parent's common law claim for loss of a child's services survived the enactment of the Child's Wrongful Death Statute, Ind. Code § 34-23-2-1. *Forte v. Connerwood Healthcare, Inc.*, 745 N.E.2d 796 (Ind. 2001).

When the facts warrant it, this Instruction should be inserted into Instruction No. 703.

715 Tax Consequences of Verdict

In arriving at your verdict, you must not consider the tax consequences, if any, of the money you may award.

Comments

This instruction is based on Ind. Code § 34-51-5-1. In tort actions for personal injuries, this statute requires the trial court to instruct the jury to not consider the tax consequences of its verdict, if such an instruction is requested by a party.

Before the General Assembly enacted the statute in 1998, the Indiana Court of Appeals had held that it was harmless error to give an instruction on the tax consequences of a verdict. *Wickizer v. Medley*, 169 Ind. App. 332, 339, 348 N.E.2d 96, 100 (1976) (holding that the instruction did not prejudice plaintiff, because in light of the other instructions, it merely cautioned the jury to base its award on the evidence, not on speculation about taxes). The Northern District of Indiana acknowledged this holding, but also pointed out the value in instructing the jury on tax consequences:

Reading between the lines of *Wickizer*, one wonders whether a scenario exists, where, if all the other instructions are proper, the giving of an income tax consequences instruction would ever be reversible error in Indiana. Indeed, after reading Judge Staton's opinion, one is convinced that the instruction is certainly valuable, if not necessary.

Selby v. Lovecamp, 690 F. Supp. 733, 735 (N.D. Ind. 1988). The General Assembly apparently agreed with the Northern District, at least in the context of tort actions for personal injuries. *But see Custer v. Schumacher Racing Corp.*, 2007 U.S. Dist. LEXIS 86877, at *13–14 (S.D. Ind. Nov. 21, 2007) (the Seventh Circuit has held that it is proper to instruct a *federal* jury that any award to the plaintiff will not be subject to federal income tax).

716 Loss of Chance Damages—Increased Risk of Future Harm or Reduced Chance for a Better Result

the value, if any, of [plaintiff]’s [increased risk of future harm][reduced chance for a better result];

Comments

This element of damages should be used in a loss of chance case where the patient survives. *See* Instruction Nos. 1556 and 1557. In circumstances where the plaintiff suffers a complete elimination of a probability of recovery, *see* Instruction No. 1555, the wrongful death damages should be used, *see* Instruction Nos. 725–735.

B. Real & Personal Property

717 Real Property—General Rule

If you decide from the greater weight of the evidence that [*defendant(s)*][is][are] liable for damage to [*plaintiff's*][*plaintiffs'*] real estate, you must decide whether the damage is temporary or permanent.

Damage to real estate is temporary when the cost to restore it is less than its fair market value immediately before the damage. If you decide that the damage to the real estate is temporary, you should award the cost of restoration.

Damage to real estate is permanent when the cost to restore it is more than its fair market value immediately before the damage. If you decide that the damage to the real estate is permanent, you should award the difference between the fair market value of the real estate immediately before and after the damage.

Comments

Under Indiana law, the measure of damages in a case of injury to real property depends first upon a determination of whether the injury is “permanent” or “temporary.” *Neal v. Bullock*, 538 N.E.2d 308 (Ind. Ct. App. 1989). A “permanent injury” is one in which the cost of restoring the property to its pre-injury condition exceeds the market value of the real property prior to the injury. *Neal*, 538 N.E.2d 308; *General Outdoor Advertising Co. v. La Salle Realty Corp.*, 141 Ind. App. 247, 218 N.E.2d 141, 151 (1966). If the injury is permanent, the measure of damages is limited to the difference between the fair market value of the property before and after the injury, based on the rationale that “economic waste” results when restoration costs exceed the economic benefit. *Warrick County v. Waste Mgmt. of Evansville*, 732 N.E.2d 1255 (Ind. Ct. App. 2000); *Anderson v. Salling Concrete Corp.*, 411 N.E.2d 728, 734 (Ind. Ct. App. 1980). For a temporary injury, the measure of damages is the cost of restoration. *Sanborn Elec. Co. v. Bloomington Athletic Club*, 433 N.E.2d 81 (Ind. Ct. App. 1982).

There can be significant departures from this general standard depending upon the nature of the injury and the type of property. *See, e.g., Terra-Prods. v. Kraft Gen. Foods*, 653 N.E.2d 89 (Ind. Ct. App. 1995) (because remediation of environmentally contaminated land was exorbitant, the Court adopted a hybrid theory of recovery that used both the cost of repair and any reduction in the property’s value after repair).

721 Personal Property—Complete Destruction or Loss

When personal property is completely [destroyed][lost], the measure of damages is the fair market value of the property at the time of its [destruction][loss].

“Fair market value” means the price a willing seller will accept from a willing buyer when neither party is forced to do so.

[You may also consider awarding damages for the loss of use of the property for the reasonable amount of time necessary to determine if the property is unrepairable and for the reasonable amount of time necessary to obtain a replacement. The damages are measured by the fair or reasonable rental value of the property in the market area.]

[Loss of use may include lost profits.]

Comments

Generally, damages for total destruction of personal property are measured by the fair market value of the property at the time of the loss. *Ridenour v. Furness*, 546 N.E.2d 322 (Ind. Ct. App. 1989). “Fair market value” is the price a willing seller will accept from a willing buyer. *Campins v. Capels*, 461 N.E.2d 712 (Ind. Ct. App. 1984); *Bottoms v. B & M Coal Corp.*, 405 N.E.2d 82 (Ind. Ct. App. 1980).

Replacement cost is not the proper measure of damages. *Harlan Sprague Dawley, Inc. v. S.E. Lab Group*, 644 N.E.2d 615 (Ind. Ct. App. 1994). Even a proper award of lost profits in which property has been damaged or destroyed should be confined to a loss of net profit; gross income is an improper measure. *Wolff v. Slusher*, 161 Ind. App. 182, 314 N.E.2d 758 (1974).

When the property is totally destroyed, the damages must be limited to the reasonable amount of time necessary for replacement, including a reasonable amount of time to determine if the property is repairable. You should consider the facts and circumstances of the case in determining the time that is reasonably necessary to obtain a replacement if the property is unrepairable. If the property is unrepairable, to determine the necessary time to obtain a replacement you can consider evidence of all the factors that go into the process of obtaining a replacement, including: the time required to determine that the property is unrepairable, the nature of the property, market availability of a replacement, the time required to locate a replacement, the availability and time required to obtain financing, the plaintiff’s effort to locate and obtain a replacement, the plaintiff’s efforts to locate and obtain financing, the defendant’s good or bad faith efforts toward the plaintiff and the plaintiff’s financial ability to obtain a replacement. *Persinger v. Lucas*, 512 N.E.2d 865 (Ind. Ct. App. 1987).

723 Personal Property—Partial Destruction

When personal property is damaged but not completely destroyed, you must decide the amount of money that will fairly compensate [plaintiff] by considering:

[Based upon the evidence insert Clause 1, 2, or 3.]

- [(1) The difference between the fair market value of the property immediately before (*describe the event*) and the fair market value of the property immediately after (*describe the event*).]
- [(2) The reasonable cost of repair where the repair will restore the property to its fair market value before (*describe the event*).]
- [(3) A combination of the evidence of reasonable cost of repair and evidence of the loss of fair market value where the repair will not restore the property to its fair market value before (*describe the event*).]

“Fair market value” means the price a willing seller will accept from a willing buyer when neither party is forced to do so.

[You may also consider awarding damages for loss of use of personal property. The damages are measured by the fair or reasonable rental value of the property in the market area for the reasonable amount of time required for repair.]

[Loss of use may include lost profits.]

Comments

The fundamental measure of damages in a situation where an item of personal property is damaged, but not destroyed, is the reduction in fair market value caused by the negligence of the tortfeasor. This reduction in fair market value may be proved in any of three ways, depending on the circumstances. First, it may be proved by evidence of the fair market value before and the fair market value after the causative event. Secondly, it may be proved by evidence of the cost of repair where repair will restore the personal property to its fair market value before the causative event. Third, the reduction in fair market value may be proved by a combination of evidence of the cost of repair and evidence of the fair market value before the causative event and the fair market value after repair, where repair will not restore the item of personal property to its fair market value before the causative event.

Wiese-GMC, Inc. v. Wells, 626 N.E.2d 595, 599 (Ind. Ct. App. 1993).

Evidence of the cost to repair can be sufficient to prove damages when there is also evidence: (1) of the actual physical damage or destruction proximately caused by the defendant, (2) that the cost to repair or restore is reasonable, and (3) that the cost to repair or restore has a reasonable relationship to the difference in fair market value immediately before and after the damage or partial destruction. *Hann v. State*, 447 N.E.2d 1144 (Ind. Ct. App. 1983).

For loss of use issues, see *Persinger v. Lucas*, 512 N.E.2d 865 (Ind. Ct. App. 1987) and *Hamacher v. Decker Livestock, Inc.*, 536 N.E.2d 304 (Ind. Ct. App. 1989).

C. Wrongful Death

725 Wrongful Death—Surviving Dependent Children

If you decide from the greater weight of the evidence that [defendant(s)][is][are] liable, and that [child][children][is][are] the surviving dependent [child][children] of [decedent], then you must decide the amount of money that will fairly compensate [surviving dependent child/children] and [personal representative] for [decedent]'s wrongful death.

In deciding the amount of money that will fairly compensate [surviving dependent child/children], you may consider:

- (1) [decedent]'s age, health, and life expectancy immediately before the injury causing [his][her] death;
- (2) [his][her] occupation and earning capacity, and probable future earnings reduced by [his][her] personal living expenses, had [he][she] lived;
- (3) the value of future support that [surviving dependent child/children] could reasonably have expected to receive from [decedent]; and
- (4) the loss of love, care, and affection that [surviving dependent child/children] could reasonably have expected to receive from the continued life of [decedent].

[Personal representative] is entitled to recover for the benefit of [decedent]'s estate:

- (1) the value of necessary and reasonable health care services provided in connection with [decedent]'s injury caused by [defendant];
- (2) the value of necessary and reasonable funeral and burial expenses for [decedent]; and
- (3) the cost of administering [decedent]'s estate.

In awarding damages, you must consider only the time period from [decedent]'s death until:

- (1) the end of [surviving dependent child/children]'s dependency, or
- (2) the end of [decedent]'s life expectancy, had the injury not occurred,

whichever period you determine would have ended first.

Comments

A judge using this instruction in a comparative fault case should add this language: "In determining the total amount of compensation, do not consider the fault of [decedent], [surviving dependent child/children][and][named nonpart(y)(ies)] in causing the death of [decedent]."

Indiana Code § 34-23-1-1 permits certain survivors of a decedent to recover damages that include, but are not limited to, "reasonable medical, hospital, funeral and burial expense, and lost earnings of such deceased person resulting from said

wrongful act or omission.” The statute has been construed as creating a right for those who suffer a pecuniary loss from the wrongful death. *Ed Wiersma Trucking Co. v. Pfaff*, 678 N.E.2d 110 (Ind. 1997), *adopting* 643 N.E.2d 909 (Ind. Ct. App. 1994); *In re Estate of Pickens*, 255 Ind. 119, 263 N.E.2d 151 (1970); *Pittsburgh, C., C. & S. L. R. Co. v. Brown*, 178 Ind. 11, 97 N.E. 145 (1912); *Hunt v. Conner*, 26 Ind. App. 41, 59 N.E. 50 (1901).

Damages for medical, hospital, funeral, and burial expenses inure to the estate, while the remainder of damages inure to the exclusive benefit of the decedent’s spouse and dependent children, if any, or to the dependent next of kin. *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939 (Ind. 2001). Accordingly, the instructions for surviving dependent children and surviving spouse should be combined if both classes exist in a case.

To ensure that an award does not exceed the actual financial loss experienced by the beneficiaries, the jury should be permitted to deduct the decedent’s personal living expenses from his lost earnings. *See Elmer Buchta Trucking, Inc.*, 744 N.E.2d at 943. This instruction therefore includes such a deduction. If a case involves a surviving spouse *and* surviving dependent children, a judge should indicate that decedent’s personal living expenses are deducted only one time.

The Wrongful Death Statute requires that different categories of damages be distributed to different entities.

That part of the damages which is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent’s estate for the payment thereof. The remainder of the damages, if any, shall, subject to the provisions of this article, inure to the exclusive benefit of the widow or widower, as the case may be, and to the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased.

Ind. Code § 34-23-1-1. In *Inlow v. Inlow*, 916 N.E.2d 664, 667 (Ind. 2009), the Indiana Supreme Court held that, because the pre-trial wrongful death settlement did not specify what part of the proceeds were for medical, hospital, funeral, and burial expenses (inuring to the estate), the trial court should direct payment from the settlement that part of the medical/burial expenses that corresponds to the ratio of the total of such expenses to the estimated total damages sustained. Although vacated, the Court of Appeals’ dissent below provides guidance for the drafting of wrongful death jury instructions. Judge May stated, “There is no way to direct the proceeds to those different entities as the statute requires without knowing the amount of damages within each category I would accordingly remand for the measurement and categorization of damages [the statute] requires and for distribution consistent with that section.” *In re Estate of Inlow*, 893 N.E.2d 734, 739–40 (Ind. Ct. App. 2008). The Committee has therefore added this categorization to the substantive instructions and the verdict forms.

The General Wrongful Death Statute, Ind. Code § 34-23-1-1, covered by Instruction Nos. 725–731, expressly permits recovery of attorney fees and costs and expenses of administration and prosecution of the action. *See also Hillebrand v. Estate of Large*, 914 N.E.2d 846, 849 (Ind. Ct. App. 2009) (wrongful death statute permits the recovery of the reasonable costs of administering the decedent’s estate and

prosecuting or compromising the action, including attorney fees in every situation, regardless of whether the decedent leaves a widower, dependents, or dependent next of kin), *trans. not sought*. *Grabach v. Evans* provides guidance on how to determine a reasonable attorney fee. 196 F. Supp. 2d 746 (N.D. Ind. 2002) (contingency fee agreements may not be used as the sole basis for determining the reasonable attorney's fee to be paid to an estate by a defendant in a wrongful death action). But while attorney's fees and the cost of pursuing the action are recoverable in wrongful death actions, the question of whether the judge or the jury should determine the amount of those fees and costs is yet unanswered. In most other types of civil cases, the determination of attorney's fees is placed "in the hands of the judiciary," not the jury. *O'Neill v. Goar*, 622 N.E.2d 562 (Ind. Ct. App. 1993) (discussing Ind. Code § 34-1-32-1(b)). The Committee has therefore omitted reference to attorney's fees and costs of pursuing the action in the wrongful death instructions and verdict forms, so that the amount may be determined by the court.

The wrongful death statute does not preclude damages for the statutory beneficiary who dies after the wrongful death victim but before judgment is entered. *Bemenderfer v. Williams*, 745 N.E.2d 212 (Ind. 2001). The statute does not, however, permit the recovery of punitive damages. *Durham v. U-haul Int'l*, 745 N.E.2d 755 (Ind. 2001).

727 Wrongful Death—Surviving Spouse

If you decide from the greater weight of the evidence that [*defendant(s)*][is][are] liable, then you must decide the amount of money that will fairly compensate [*surviving spouse*] and [*personal representative*] for [*decedent*]'s wrongful death.

In deciding the amount of money that will fairly compensate [*surviving spouse*], you may consider:

- (1) [*decedent*]'s age, health, and life expectancy immediately before the injury causing [*his*][*her*] death;
- (2) [*his*][*her*] occupation and earning capacity, and probable future earnings reduced by [*his*][*her*] personal living expenses, had [*he*][*she*] lived;
- (3) the value of future support that [*surviving spouse*] could reasonably have expected to receive from [*decedent*]; and
- (4) the loss of love, care, and affection that [*surviving spouse*] could reasonably have expected to receive from the continued life of [*decedent*].

[*Personal representative*] is entitled to recover for the benefit of [*decedent*]'s estate:

- (4) the value of necessary and reasonable health care services provided in connection with [*decedent*]'s injury caused by [*defendant*];
- (5) the value of necessary and reasonable funeral and burial expenses for [*decedent*]; and
- (6) the cost of administering [*decedent*]'s estate.

In awarding damages, you must consider only the time period from [*decedent*]'s death until:

- (1) the end of [*decedent*]'s life expectancy, had the injury not occurred, or
- (2) the end of [*surviving spouse's*] life expectancy,

whichever period you determine would have ended first.

Comments

A judge using this instruction in a comparative fault case should add this language: "In determining the total amount of compensation, do not consider the fault of [*decedent*], [*surviving spouse*][and][*named nonpart(y)(ies)*] in causing the death of [*decedent*]." The comparative fault verdict forms currently direct the jury how to consider the fault of named nonparties in determining the final amount of the verdict. In cases where a surviving dependent child, surviving spouse, or surviving dependent next of kin is a party (rather than a nonparty) the verdict form should be modified to include the relevant party.

Indiana Code § 34-23-1-1 permits certain survivors of a decedent to recover damages that include, but are not limited to, "reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission." The statute has been construed as creating a right for

those who suffer a pecuniary loss from the wrongful death. *Ed Wiersma Trucking Co. v. Pfaff*, 678 N.E.2d 110 (Ind. 1997), *adopting* 643 N.E.2d 909 (Ind. Ct. App. 1994); *Pickens' Estate v. Pickens*, 255 Ind. 119, 263 N.E.2d 151 (1970); *Pittsburgh, C., C. & St. L. Ry. v. Brown*, 178 Ind. 11, 97 N.E. 145 (1912); *Hunt v. Conner*, 26 Ind. App. 41, 59 N.E. 50 (1901).

Damages for medical, hospital, funeral, and burial expenses inure to the estate, while the remainder of damages inure to the exclusive benefit of the decedent's spouse and dependent children, if any, or to the dependent next of kin. *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939 (Ind. 2001). Accordingly, the instructions for surviving dependent children and surviving spouse should be combined if both classes exist in a case.

To ensure that an award does not exceed the actual financial loss experienced by the beneficiaries, the jury should be permitted to deduct the decedent's personal living expenses from his lost earnings. *See Elmer Buchta Trucking, Inc.*, 744 N.E.2d at 943. This instruction therefore includes such a deduction. If a case involves a surviving spouse *and* surviving dependent children, a judge should indicate that decedent's personal living expenses are deducted only one time.

The Wrongful Death Statute requires that different categories of damages be distributed to different entities.

That part of the damages which is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof. The remainder of the damages, if any, shall, subject to the provisions of this article, inure to the exclusive benefit of the widow or widower, as the case may be, and to the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased.

Ind. Code § 34-23-1-1. In *Inlow v. Inlow*, 916 N.E.2d 664, 667 (Ind. 2009), the Indiana Supreme Court held that, because the pre-trial wrongful death settlement did not specify what part of the proceeds were for medical, hospital, funeral, and burial expenses (inuring to the estate), the trial court should direct payment from the settlement that part of the medical/burial expenses that corresponds to the ratio of the total of such expenses to the estimated total damages sustained. Although vacated, the Court of Appeals' dissent below provides guidance for the drafting of wrongful death jury instructions. Judge May stated, "[H]aving the jury determine the amount of damages within each category would obviously help the trial court direct the proceeds to those different entities as the statute requires. For that reason, I think the language should be added to the jury instructions." *In re Estate of Inlow*, 893 N.E.2d 734, 737 (Ind. Ct. App. 2008). The Committee has therefore added this itemization to the substantive instructions and the verdict forms.

The General Wrongful Death Statute, Ind. Code § 34-23-1-1, covered by Instruction Nos. 725–731, expressly permits recovery of attorney fees and costs and expenses of administration and prosecution of the action. *See also Hillebrand v. Estate of Large*, 914 N.E.2d 846, 849 (Ind. Ct. App. 2009) (wrongful death statute permits the recovery of the reasonable costs of administering the decedent's estate and prosecuting or compromising the action, including attorney fees in every situation, regardless of whether the decedent leaves a widower, dependents, or dependent next

of kin), *trans. not sought*. *Grabach v. Evans* provides guidance on how to determine a reasonable attorney fee. 196 F. Supp. 2d 746 (N.D. Ind. 2002) (contingency fee agreements may not be used as the sole basis for determining the reasonable attorney's fee to be paid to an estate by a defendant in a wrongful death action). But while attorney's fees and the cost of pursuing the action are recoverable in wrongful death actions, the question of whether the judge or the jury should determine the amount of those fees and costs is yet unanswered. In most other types of civil cases, the determination of attorney's fees is placed "in the hands of the judiciary," not the jury. *O'Neill v. Goar*, 622 N.E.2d 562 (Ind. Ct. App. 1993) (discussing Ind. Code § 34-1-32-1(b)). The Committee has therefore omitted reference to attorney's fees and costs of pursuing the action in the wrongful death instructions and verdict forms, so that the amount may be determined by the court.

The wrongful death statute does not preclude damages for the statutory beneficiary who dies after the wrongful death victim but before judgment is entered. *Bemenderfer v. Williams*, 745 N.E.2d 212 (Ind. 2001). The statute does not, however, permit the recovery of punitive damages. *Durham v. U-haul Int'l*, 745 N.E.2d 755 (Ind. 2001).

The wrongful death statute provides the only remedy against a person causing the death of a spouse, and there is no independent claim against this person for loss of consortium. *Durham*, 745 N.E.2d at 757. Loss of consortium damages are measured by the life expectancy of the deceased spouse or the surviving spouse, whichever is shorter. *Durham*, 745 N.E.2d at 757.

729 Wrongful Death—Surviving Dependent Next of Kin

If you decide from the greater weight of the evidence that [*defendant(s)*][is][are] liable, and that [*surviving dependent next-of-kin*][is][are] the surviving dependent next-of-kin of [*decedent*], then you must decide the amount of money that will fairly compensate [*surviving dependent next-of-kin*] and [*personal representative*] for [*decedent*]'s wrongful death.

In deciding the amount of money that will fairly compensate [*surviving dependent next-of-kin*], you may consider:

- (1) [*decedent*]'s age, health, and life expectancy immediately before the injury causing [*his*][*her*] death;
- (2) [*his*][*her*] occupation and earning capacity, and probable future earnings reduced by [*his*][*her*] personal living expenses, had [*he*][*she*] lived;
- (3) the value of future support that [*surviving dependent next-of-kin*] could reasonably have expected to receive from [*decedent*]; and
- (4) the loss of love, care, and affection that [*surviving dependent next-of-kin*] could reasonably have expected to receive from the continued life of [*decedent*].

[*Personal representative*] is entitled to recover for the benefit of [*decedent*]'s estate:

- (1) the value of necessary and reasonable health care services provided in connection with [*decedent*]'s injury caused by [*defendant*];
- (2) the value of necessary and reasonable funeral and burial expenses for [*decedent*]; and
- (3) the cost of administering [*decedent*]'s estate.

In awarding damages, you must consider only the time period from [*decedent*]'s death until:

- (1) the end of [*surviving dependent next-of-kin*] dependency, or
- (2) the end of [*decedent*]'s life expectancy, had the injury not occurred,

whichever period you determine would have ended first.

Comments

A judge using this instruction in a comparative fault case should add this language: "In determining the total amount of compensation, do not consider the fault of [*decedent*], [*surviving dependent next-of-kin*][and][*named nonpart(y)(ies)*] in causing the death of [*decedent*]." The comparative fault verdict forms currently direct the jury how to consider the fault of named nonparties in determining the final amount of the verdict. In cases where a surviving dependent child, surviving spouse, or surviving dependent next of kin is a party (rather than a nonparty) the verdict form should be modified to include the relevant party.

Indiana Code § 34-23-1-1 permits certain survivors of a decedent to recover

damages that include, but are not limited to, “reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission.” The statute has been construed as creating a right for those who suffer a pecuniary loss from the wrongful death. *Ed Wiersma Trucking Co. v. Pfaff*, 678 N.E.2d 110 (Ind. 1997), *adopting* 643 N.E.2d 909 (Ind. Ct. App. 1994); *Pickens’ Estate v. Pickens*, 255 Ind. 119, 263 N.E.2d 151 (1970); *Pittsburgh, C., C. & St. L. Ry. v. Brown*, 178 Ind. 11, 97 N.E. 145 (1912); *Hunt v. Conner*, 26 Ind. App. 41, 59 N.E. 50 (1901).

Damages for medical, hospital, funeral, and burial expenses inure to the estate, while the remainder of damages inure to the exclusive benefit of the decedent’s spouse and dependent children, if any, or to the dependent next of kin. *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939 (Ind. 2001). The surviving dependent next of kin instruction should only be used if a decedent leaves no surviving spouse or surviving dependent next of kin. Dependent next of kin are entitled to recover the same damages as spouses and dependent children, including loss of love, care, and affection. *Ed Wiersma Trucking Co. v. Pfaff*, 643 N.E.2d 909, 913 (Ind. Ct. App. 1994).

To ensure that an award does not exceed the actual financial loss experienced by the beneficiaries, the jury should be permitted to deduct the decedent’s personal living expenses from his lost earnings. *See Elmer Buchta Trucking, Inc.*, 744 N.E.2d at 943. This instruction therefore includes such a deduction.

The Wrongful Death Statute requires that different categories of damages be distributed to different entities.

That part of the damages which is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent’s estate for the payment thereof. The remainder of the damages, if any, shall, subject to the provisions of this article, inure to the exclusive benefit of the widow or widower, as the case may be, and to the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased.

Ind. Code § 34-23-1-1. In *Inlow v. Inlow*, 916 N.E.2d 664, 667 (Ind. 2009), the Indiana Supreme Court held that, because the pre-trial wrongful death settlement did not specify what part of the proceeds were for medical, hospital, funeral, and burial expenses (inuring to the estate), the trial court should direct payment from the settlement that part of the medical/burial expenses that corresponds to the ratio of the total of such expenses to the estimated total damages sustained. Although vacated, the Court of Appeals’ dissent below provides guidance for the drafting of wrongful death jury instructions. Judge May stated, “[H]aving the jury determine the amount of damages within each category would obviously help the trial court direct the proceeds to those different entities as the statute requires. For that reason, I think the language should be added to the jury instructions.” *In re Estate of Inlow*, 893 N.E.2d 734, 737 (Ind. Ct. App. 2008). The Committee has therefore added this itemization to the substantive instructions and the verdict forms.

The General Wrongful Death Statute, Ind. Code § 34-23-1-1, covered by Instruction Nos. 725-731, expressly permits recovery of attorney fees and costs and expenses of administration and prosecution of the action. *See also Hillebrand v. Estate of*

Large, 914 N.E.2d 846, 849 (Ind. Ct. App. 2009) (wrongful death statute permits the recovery of the reasonable costs of administering the decedent's estate and prosecuting or compromising the action, including attorney fees in every situation, regardless of whether the decedent leaves a widower, dependents, or dependent next of kin), *trans. not sought*. *Grabach v. Evans* provides guidance on how to determine a reasonable attorney fee. 196 F. Supp. 2d 746 (N.D. Ind. 2002) (contingency fee agreements may not be used as the sole basis for determining the reasonable attorney's fee to be paid to an estate by a defendant in a wrongful death action). But while attorney's fees and the cost of pursuing the action are recoverable in wrongful death actions, the question of whether the judge or the jury should determine the amount of those fees and costs is yet unanswered. In most other types of civil cases, the determination of attorney's fees is placed "in the hands of the judiciary," not the jury. *O'Neill v. Goar*, 622 N.E.2d 562 (Ind. Ct. App. 1993) (discussing Ind. Code § 34-1-32-1(b)). The Committee has therefore omitted reference to attorney's fees and costs of pursuing the action in the wrongful death instructions and verdict forms, so that the amount may be determined by the court.

The wrongful death statute does not preclude damages for the statutory beneficiary who dies after the wrongful death victim but before judgment is entered. *Bemenderfer v. Williams*, 745 N.E.2d 212 (Ind. 2001). The statute does not, however, permit the recovery of punitive damages. *Durham v. U-haul Int'l*, 745 N.E.2d 755 (Ind. 2001); *Ind. Code § 34-1-32-1(c)*.

731 Wrongful Death—Damages Recoverable by the Estate’s Personal Representative—No Surviving Spouse, Dependent Children or Dependent Next of Kin

If you decide from the greater weight of the evidence that [*defendant(s)*][is][are] liable to [*personal representative*], you must then decide the total amount of money that will fairly compensate [*decedent*]’s estate for [*decedent*]’s wrongful death.[*Personal representative*] is entitled to recover for the benefit of [*decedent*]’s estate:

- (1) the value of necessary and reasonable health care services provided in connection with [*decedent*]’s injury caused by [*defendant*];
- (2) the value of necessary and reasonable funeral and burial expenses for [*decedent*]; and
- (3) the cost of administering [*decedent*]’s estate.

Comments

This instruction is for use in wrongful death actions where there is no surviving spouse, dependent children, or dependent next of kin.

A judge using this instruction in a comparative fault case should add this language: “In determining the total amount of compensation, do not consider the fault of [*decedent*][and][*named nonpart(y)(ies)*] in causing the death of [*decedent*].” The comparative fault verdict forms will direct the jury how to consider the fault of those people or entities in determining the final amount of the verdict.

Indiana Code § 34-23-1-1 permits the personal representative to recover the decedent’s medical and funeral expenses, plus any other pecuniary or other loss suffered by the decedent’s survivors. *Best Homes, Inc. v. Rainwater*, 714 N.E.2d 702 (Ind. Ct. App. 1999).

The General Wrongful Death Statute, Ind. Code § 34-23-1-1, covered by Instruction Nos. 725–731, expressly permits recovery of attorney fees and costs and expenses of administration and prosecution of the action. *See also Hillebrand v. Estate of Large*, 914 N.E.2d 846, 849 (Ind. Ct. App. 2009) (wrongful death statute permits the recovery of the reasonable costs of administering the decedent’s estate and prosecuting or compromising the action, including attorney fees in every situation, regardless of whether the decedent leaves a widower, dependents, or dependent next of kin), *trans. not sought. Grabach v. Evans* provides guidance on how to determine a reasonable attorney fee. 196 F. Supp. 2d 746 (N.D. Ind. 2002) (contingency fee agreements may not be used as the sole basis for determining the reasonable attorney’s fee to be paid to an estate by a defendant in a wrongful death action). But while attorney’s fees and the cost of pursuing the action are recoverable in wrongful death actions, the question of whether the judge or the jury should determine the amount of those fees and costs is yet unanswered. In most other types of civil cases, the determination of attorney’s fees is placed “in the hands of the judiciary,” not the jury. *O’Neill v. Goar*, 622 N.E.2d 562 (Ind. Ct. App. 1993) (discussing Ind. Code § 34-1-32-1(b)). The Committee has therefore omitted reference to attorney’s fees and costs of pursuing the action in the wrongful death instructions and verdict forms, so that the amount may be determined by the court.

733 Wrongful Death of Unmarried Adult with Non-Dependent Parents or Children

If you decide from the greater weight of the evidence that:

- (1) [defendant(s)][is][are] liable for [decedent]’s death,
- (2) [parent(s) or child/children][is][are] the nondependent surviving parent[s][or-][child][children] of [decedent], and
- (3) [parent(s) or child/children] had a genuine, substantial, and ongoing relationship with [decedent],

then you must decide the amount of money that will fairly compensate [parent(s) or child/children] and [personal representative] for [decedent]’s wrongful death.

In determining the amount to award to [parent(s) or child/children], you may consider, but are not limited to, the loss of love and companionship that [parent(s) or child/children] could reasonably have expected to receive from the continued life of [decedent]. However, you may not award damages to compensate for [parent(s) or child/s/children’s] grief, to punish [defendant(s)], or to discourage similar conduct.

[Personal representative] is entitled to recover for the benefit of [decedent]’s estate:

- (1) the value of necessary and reasonable health care services provided in connection with [decedent]’s injury caused by [defendant];
- (2) the value of necessary and reasonable funeral and burial expenses for [decedent]; and
- (3) the cost of administering [decedent]’s estate.

In awarding damages, you must consider only the time period from [decedent]’s death until:

- (1) the end of [decedent]’s life expectancy, had the injury not occurred, or
- (2) the end of [parent(s) or child/children] life expectancy,

whichever period you determine would have ended first.

Comments

A judge using this instruction in a comparative fault case should add this language: “In determining the total amount of compensation, do not consider the fault of [decedent], [parent(s) or child/children][and][named nonpart(y)(ies)] in causing the death of [decedent].” The comparative fault verdict forms currently direct the jury how to consider the fault of named nonparties in determining the final amount of the verdict. In cases where a surviving dependent child, surviving spouse, or surviving dependent next of kin is a party (rather than a nonparty) the verdict form should be modified to include the relevant party.

This pattern instruction should be used in a wrongful death action on behalf of an adult unmarried individual who has no dependent parents or children and who is not a child. Ind. Code § 34-23-1-2(a). Under the statute, only the personal representa-

tive of the adult person has standing to bring a wrongful death action, but it is the nondependent parent or child who has the burden of proving that the parent/child had a genuine, substantial, and ongoing relationship with the adult person before the parent/child may recover damages for loss of love and companionship. *See* Ind. Code § 34-23-1-2(b), (f). The statute is not clear as to whether the nondependent parent/child are parties to the action.

In an action to recover damages for the death of an adult unmarried individual with no dependents, the damages *may not* include damages awarded for a person's grief or punitive damages. Ind. Code § 34-23-1-2(c)(2). Damages may include but are not limited to reasonable medical, hospital, funeral, and burial expenses necessitated by the wrongful act or omission that caused the adult person's death, and loss of the adult person's love and companionship. Ind. Code § 34-23-1-2(c)(3).

The Wrongful Death Statute requires that different categories of damages be distributed to different entities. That part of the damages which is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof, while the remainder of the damages, if any, shall, inure to the exclusive benefit of the nondependent parents or children of the adult person. Ind. Code § 34-23-1-2(d). In *Inlow v. Inlow*, 916 N.E.2d 664, 667 (Ind. 2009), the Indiana Supreme Court held that, because the pre-trial wrongful death settlement did not specify what part of the proceeds were for medical, hospital, funeral, and burial expenses (inuring to the estate), the trial court should direct payment from the settlement that part of the medical/burial expenses that corresponds to the ratio of the total of such expenses to the estimated total damages sustained. Although vacated, the Court of Appeals' dissent below provides guidance for the drafting of wrongful death jury instructions. Judge May stated, "[H]aving the jury determine the amount of damages within each category would obviously help the trial court direct the proceeds to those different entities as the statute requires. For that reason, I think the language should be added to the jury instructions." *In re Estate of Inlow*, 893 N.E.2d 734, 737 (Ind. Ct. App. 2008). The Committee has therefore added this itemization to the substantive instructions and the verdict forms.

Damages for loss of the adult person's love and companionship may not exceed \$300,000, and the jury cannot be informed of this limitation; if the jury awards more than \$300,000 for loss of love and companionship, the judge is required to reduce that part of award to \$300,000. Ind. Code § 34-23-1-2(e).

Ind. Code § 34-23-1-2(g) provides a jury "may not hear evidence concerning the lost earnings of the adult person [without dependents] that occur as a result of the wrongful act or omission." Accordingly, the model instruction includes no reference to lost earnings, as presumably no such evidence will be before the jury to consider.

The Indiana Supreme Court has held that "reasonable attorney fees incurred in the prosecution of an action under the Adult Wrongful Death Statute are within the damages permitted by the statute." *McCabe v. Comm'r, Ind. Dep't of Ins.*, 949 N.E.2d 816, 821 (Ind. 2011). Litigation expenses are also recoverable. *Hematology-Oncology of Ind., Inc. v. Fruits*, 950 N.E.2d 294, 296 (Ind. 2011); *see also Hillebrand v. Estate of Charlotte Fern*, 914 N.E.2d 846, 849 (Ind. Ct. App. 2009) (wrongful death statute permits the recovery of the reasonable costs of administering the decedent's estate and prosecuting or compromising the action, including

attorney fees in every situation, regardless of whether the decedent leaves a widower, dependents, or dependent next of kin), *trans. not sought*. *Grabach v. Evans* provides guidance on how to determine a reasonable attorney fee. 196 F. Supp. 2d 746 (N.D. Ind. 2002) (contingency fee agreements may not be used as the sole basis for determining the reasonable attorney's fee to be paid to an estate by a defendant in a wrongful death action). But while attorney's fees and the cost of pursuing the action are recoverable in wrongful death actions, the question of whether the judge or the jury should determine the amount of those fees and costs is yet unanswered. In most other types of civil cases, the determination of attorney's fees is placed "in the hands of the judiciary," not the jury. *O'Neill v. Goar*, 622 N.E.2d 562 (Ind. Ct. App. 1993) (discussing Ind. Code § 34-1-32-1(b)). The Committee has therefore omitted reference to attorney's fees and costs of pursuing the action in the wrongful death instructions and verdict forms, so that the amount may be determined by the court.

Ind. Patient's Comp. Fund v. Brown, 949 N.E.2d 822 (Ind. 2011), also permits recovery for loss of services under the Adult Wrongful Death Statute.

The wrongful death statute does not preclude damages for the statutory beneficiary who dies after the wrongful death victim but before judgment is entered. *Bemenderfer v. Williams*, 745 N.E.2d 212 (Ind. 2001). The statute does not, however, permit the recovery of punitive damages. *Durham v. U-haul Int'l*, 745 N.E.2d 755 (Ind. 2001).

Verdict Forms 5047 or 5049 should be used in conjunction with this model instruction. The form directs the jury to specify the amount be awarded to each person and the amount for loss of the adult person's love and companionship, pursuant to Ind. Code § 34-23-1-2(h), (i).

735 Wrongful Death—Death of Child

If you decide from the greater weight of the evidence that [defendant(s)][is][are] liable to [plaintiff(s)], you must then decide the amount of money that will fairly compensate [plaintiff(s)] for the loss they suffered from the wrongful death of [child].

In determining the amount of money to award, you may consider only the value of:

- (1) the loss of [child]'s services;
- (2) the loss of [child]'s love and companionship;
- (3) the cost of health care and hospitalization required by the wrongful act or omission that caused [child]'s death;
- (4) the cost of [child]'s funeral and burial;
- (5) reasonable cost of psychiatric and psychological counseling incurred by [surviving parent(s) and minor siblings] and required as a result of the [child]'s death;
- (6) [child]'s uninsured debts, including debts that [parent(s)][is][are] required to pay on [child]'s behalf; and
- (7) the cost of administering [child]'s estate.

In awarding damages for the loss of [child]'s love and companionship, damages may be awarded from the time of [child]'s death until the end of child's last surviving parent's life expectancy.

In awarding damages other than for loss of love and companionship, you may consider only the time from [child]'s death until:

- (1) [he][she] would have reached the age of twenty;
- (2) [he][she] would have reached the age of twenty-three years if [he][she] was enrolled in a postsecondary educational institution, or a career and technical education school or program that is not a postsecondary educational program; or
- (3) the end of child's last surviving parent's life expectancy.

whichever period you determine would have ended first.

Comments

This instruction is for use in wrongful death actions brought by parents for the death of a child. The elements of damage were adapted from Ind. Code § 34-23-2-1.

A judge using this instruction in a comparative fault case should add this language: "In determining the total amount of compensation, do not consider the fault of [child][parent(s)][and][named nonpart(y)(ies)] in causing the death of [child]." The comparative fault verdict forms currently direct the jury how to consider the fault of named nonparties in determining the final amount of the verdict.

While the general wrongful death statute, Ind. Code § 34-23-1-1, says that damages

include but are “not limited to” listed elements, the wrongful death of a child statute merely lists the elements of damages that are recoverable. Ind. Code § 34-23-2-1. The model instruction for the death of a child therefore tells the jury to consider “only” certain elements of damages.

The prior version of this statute did not have specific provisions concerning damages. Cases interpreted that version to limit damages to the time when the child would have turned eighteen, less the cost of the child’s support and maintenance. *E.g., Andis v. Hawkins*, 489 N.E.2d 78, 82 (Ind. Ct. App. 1986). Because the current statute lists the damages available and does not explicitly provide for the offset of the cost of the child’s support and maintenance, that offset is not included in the revised model instruction. More recent cases also hold that the current statute permits recovery of damages for loss of the child’s love and companionship from the time of the child’s death to the time of the death of the last surviving parent. *Robinson v. Wroblewski*, 704 N.E.2d 467 (Ind. 1998).

Ind. Code § 34-23-2-1 does not require that the jury make special findings regarding specific elements of damages in its verdict form. Depending on the identity of the plaintiffs and their custody of the deceased child, Ind. Code § 34-23-2-1(i) may require that the court apportion elements (1), (2), (5), and (6) in the second paragraph of the instruction.

But while attorney’s fees and the cost of pursuing the action are recoverable in wrongful death actions, the question of whether the judge or the jury should determine the amount of those fees and costs is yet unanswered. In most other types of civil cases, the determination of attorney’s fees is placed “in the hands of the judiciary,” not the jury. *O’Neill v. Goar*, 622 N.E.2d 562 (Ind. Ct. App. 1993) (discussing Ind. Code § 34-1-32-1(b)). The Committee has therefore omitted reference to attorney’s fees and costs of pursuing the action in the wrongful death instructions and verdict forms, so that the amount may be determined by the court.

Punitive damages are not recoverable under the child wrongful death statute. *Forte v. Connerwood Healthcare, Inc.*, 745 N.E.2d 796 (Ind. 2001).

A parent’s common law claim for the loss of his or her child’s services (which is in the nature of a property right as opposed to an action for personal injury) does survive the enactment of the child wrongful death statute; however, punitive damages are not recoverable under the parent’s common law claim for loss of the child’s services. *Forte v. Connerwood Healthcare, Inc.*, 745 N.E.2d 796, 803 (Ind. 2001).

An eight to ten week old fetus is not a “child” for purposes of the Child Wrongful Death Statute. *Bolin v. Wingert*, 764 N.E.2d 201 (Ind. 2002).

The Committee recommends that the general verdict forms for comparative fault or common law negligence accompany this instruction. *See* Series 5000 (verdict forms).

D. Punitive

737 Punitive Damages

If you decide that [*plaintiff*] is entitled to recover, then in addition to compensatory damages, you may also award punitive damages.

Punitive damages may be awarded if you decide that [*plaintiff*] proved by clear and convincing evidence that either:

- (1) [*defendant*]'s actions amounted to willful and wanton misconduct; OR
- (2) (A) [*defendant*] acted either:

- a. maliciously;
- b. fraudulently;
- c. oppressively; OR
- d. with gross negligence,

AND

(B) [*defendant*]'s acts were not the result of any of the following:

- a. mistake of fact;
- b. an honest error of judgment;
- c. overzealousness;
- d. ordinary negligence; OR
- e. other human failing.

Comments

This instruction should be given only where punitive damages are allowable and should follow the instruction on compensatory damages. Instruction No. 113 defining clear and convincing evidence should also be given. Punitive damages must be proven by clear and convincing evidence. *Williams v. Tharp*, 914 N.E.2d 756, 769 n.6 (Ind. 2009) (citing *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 137 (Ind. 1988)).

There is no absolute right to punitive damages, although in a proper case they may be awarded in addition to actual damages as punishment for the offense and to deter similar misconduct. *Glissman v. Rutt*, 175 Ind. App. 493, 372 N.E.2d 1188 (1978). Punitive damages are ordinarily prohibited without compensatory damages, but they may be awarded without compensatory damages if the plaintiff has proved defamation per se. See *Henrichs v. Pivarnik*, 588 N.E.2d 537 (Ind. Ct. App. 1992).

Although the Indiana Supreme Court has stated that punitive damages may be awarded on a showing of wanton and willful misconduct, *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019 (Ind. 1986), its later cases merely say that punitive damages are recoverable for acts done with malice, fraud, gross negligence, or oppressiveness. *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993); *Bud Wolf*

Chevrolet, Inc. v. Robertson, 519 N.E.2d 135 (Ind. 1988). The Indiana Court of Appeals has stated, however, that willful and wanton misconduct remains an independent circumstance in which punitive damages may be awarded. *America's Directories Incorporated, Inc. v. Stellhorn One Hour Photo, Inc.*, 833 N.E.2d 1059 (Ind. Ct. App. 2005).

To recover punitive damages in a breach of contract action, the plaintiff must plead and prove the existence of an independent tort for which Indiana would permit the recovery of punitive damages. *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*, 608 N.E.2d 975, 984 (Ind. 1993). An example of such an independent tort upon which punitive damages may be based is the breach of an insurer's duty to deal with its insured in good faith. *Erie Ins. Co.*, 622 N.E.2d at 520.

While some cases have stated that punitive damages are not recoverable if the defendant is also held criminally responsible for the same conduct, *see, e.g., Glissman v. Rutt*, 175 Ind. App. 493, 372 N.E.2d 1188 (1978), Indiana statute states, "[i]t is not a defense to an action for punitive damages that the defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action." Ind. Code § 34-24-3-3; *see also Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003). It must be noted that Ind. Code ch. 34-24-3 provides a statutory remedy for treble damages in certain civil actions by crime victims and has elements and burden of proof that differ from common law punitive damages.

A court must reduce a jury's award of punitive damages to three times the compensatory damages or \$50,000, whichever is greater. Ind. Code §§ 34-51-3-4, -5; *Westray v. Wright*, 834 N.E.2d 173 (Ind. Ct. App. 2005). Except for punitive damages awards that must be deposited in the hazardous substances response trust fund, punitive damages must be paid to the clerk of the court, who pays 25 percent to the person who was awarded them and 75 percent into the violent crime victims compensation fund. Ind. Code § 34-51-3-6. This allocation is not an unconstitutional taking of property or use of the attorney's services without just compensation. *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003).

A jury cannot be advised of the limitation on the amount of punitive damages or the allocation to the victim's compensation fund. Ind. Code § 34-51-3-3.

739 Punitive Damages—Terms—Definitions

The terms in the previous instruction on punitive damages have the following meanings:

“Gross negligence” is a voluntary [act][failure to act] done with reckless disregard of the consequences to another person.

“Wanton or willful” misconduct is an intentional [act][failure to act] done with reckless disregard of probable injury to a person, when the defendant knew of that probability [and, if the defendant failed to act, (he)(she) had the opportunity to avoid the risk].

“Malice” is [an act][a failure to act] done:

- (1) intentionally,
- (2) without legal authority or excuse, and
- (3) with the intent to [injure][harm].

“Fraud” is [an act][a failure to act][a concealment] done knowingly or intentionally to cheat or deceive another person.

“Oppressiveness” is [an act][a failure to act] done in a domineering, overbearing, or controlling manner that subjects another person to a cruel and unjust hardship.

Comments

The definitions for maliciously and oppressively were patterned after those found in *Lazarus Dep’t Store v. Sutherlin*, 544 N.E.2d 513 (Ind. Ct. App. 1989). The definition for fraudulently is patterned after the definition for fraud found in Instruction No. 3103. The definition for gross negligence is taken from *Northern Ind. Pub. Serv. Co. v. Sharp*, 790 N.E.2d 462 (Ind. 2003).

A definition of the phrase “clear and convincing evidence” may be found in Instruction No. 113.

741 Measure of Punitive Damages

If you decide to award punitive damages, you must determine the amount of money you believe will be adequate to:

- (1) punish [*defendant*] for what [he][she][it] did to [*plaintiff*]; and
- (2) [deter][discourage][*defendant*] and other [persons][companies] from similar acts in the future.

In deciding the amount of punitive damages, you may consider:

- (a) the amount of actual or potential harm suffered by [*plaintiff*] as a result of [*defendant*]'s conduct;
- (b) the amount of any civil [fines][penalties] that apply to conduct similar to [*defendant*]'s conduct;
- (c) [*defendant*]'s financial condition; and
- (d) the degree of reprehensibility of [*defendant*]'s conduct.

Reprehensible means [worthy of severe (criticism)(blame)][deserving of severe disapproval]. In determining the degree of reprehensibility of [*defendant*]'s conduct, you should consider the following:

- Was the harm caused physical as opposed to financial?
- Did [*defendant*]'s conduct show a reckless disregard for the health or safety of others?
- Did [*defendant*]'s conduct involve repeated actions or was it an isolated incident?
- Was the harm the result of intentional malice, trickery, or deceit, as opposed to mere accident?
- Was the target of [*defendant*]'s conduct financially vulnerable?

If you award punitive damages, you must state the amount of those damages on the verdict form separately from the amount of any compensatory damages.

Comments

The portion of this Instruction relating to the purpose of punitive damages is based on *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135 (Ind. 1988), and *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993).

The portion of this Instruction relating to the first three factors to consider in awarding punitive damages was taken from *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). The fourth factor was taken from *Stroud v. Lints*, 790 N.E.2d 440, 445–47 (Ind. 2003).

The reprehensibility analysis follows the analysis set forth in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), which discusses the due process prohibition against grossly excessive or arbitrary punishments and the “guideposts”

trial and appellate courts should apply to determine whether a punitive damage award violated the due process clause. Although *State Farm* did not discuss instructing the jury on those guideposts, they may help juries determine the amount of punitive damages to award.

745 Punitive Damages—Out-of-State Conduct

You may not use evidence of out-of-state conduct to punish [*defendant*] if that conduct was lawful in the place where it occurred.

Comments

This Instruction is based on dicta in *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). “A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.” *Id.* at 604.

CHAPTER 900

COMPARATIVE FAULT

SYNOPSIS

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901 Issues for Trial; Burden of Proof

The Plaintiff, _____, sued _____, the Defendant.

[Plaintiff] claims that [defendant][insert claimed action(s)]. [Plaintiff] must prove [his][her][its] claims by the greater weight of the evidence.

[Defendant] denies [plaintiff]’s claims. [Defendant] is not required to disprove [plaintiff]’s claims.

[Defendant] has claimed certain defenses. [Defendant] must prove [his][her][its] defense[s] of [specify affirmative defense(s)] by the greater weight of the evidence.

[(Plaintiff) also claims (he)(she)(it) is entitled to an award of punitive damages because (insert brief statement of claim for punitive damages). (Plaintiff) must prove this claim by clear and convincing evidence.]

Comments

This instruction should be modified to set forth all claims, counterclaims, and cross claims.

Jury Rule 20 and Trial Rule 51(A) require that the trial court give preliminary instructions as to the issues for trial and the burden of proof. The trial court and counsel should carefully prepare a preliminary instruction setting out the issues for trial in narrative form, including all claims, counterclaims, and cross claims. The instruction should be brief, accurate, conversational, and as non-technical as possible.

If a pretrial order has been entered, *see* T.R. 16(J), the Committee recommends that the instruction be drafted based on that order, which supplants the allegations in the pleadings, but should not be rigidly or pointlessly applied. *See Vlach v. Goode*, 515 N.E.2d 569 (Ind. Ct. App. 1987); 62 Am. Jur. 2d PreTrial Conference § 29 at 661 (1972).

Whether a pretrial order has been entered or not, the Committee recommends against reading the pleadings to the jury.

If a judge gives this Instruction as a final instruction, he or she should also give Instruction No. 903, or otherwise ensure that the jury is instructed on the elements of a negligence claim.

903 Elements; Burden of Proof

[Plaintiff] claims [defendant] was [negligent][*designate other type of fault*].

To recover on this claim, [plaintiff] must prove by the greater weight of the evidence that:

1. [defendant] acted or failed to act [by][in one or more of the following ways]:
[insert how plaintiff claims that defendant was negligent or otherwise at fault];
and
2. [defendant]'s act or failure to act was [negligent][*designate other type of fault*];
and
3. [defendant]'s act or failure to act was a responsible cause of [plaintiff]'s
claimed injuries; and
4. [plaintiff] suffered damages as a result of the injuries.

To recover an award of punitive damages, [plaintiff] must prove by clear and convincing evidence that:

[Here set out the elements of plaintiff's claim for punitive damages to correspond to the factual disputes raised by the evidence.]

[Defendant] denies [plaintiff]'s claims. [Defendant] is not required to disprove [plaintiff]'s claims.

A defendant may defend [himself][herself] by claiming certain specific "defenses." In this case [defendant] claims: *[Here set out the elements of defendant's affirmative defenses to correspond to the factual disputes raised by the evidence.]* To prove these defenses, [defendant] must prove by the greater weight of the evidence that:

[Here set out the elements of defendant's affirmative defenses to correspond to the factual disputes raised by the evidence.]

Comments

In *Laporte Cmty. Sch. Corp. v. Rosales*, 963 N.E.2d 520, 524 (Ind. 2012), the Indiana Supreme Court criticized an instruction based on Civil Pattern Instruction No. 9.03, stating:

While Instruction 22 may have been intended to explain to the jury that the plaintiff had the burden of proving the elements of negligence, proximate cause, and damages, the language and phrasing of the instruction permitted the jury to infer that the factual allegations set forth in subparts A-E should be understood as factual circumstances identified by the court, based on the facts of the case, that automatically constitute negligence if proven by a preponderance of the evidence.

But see Hill v. Rhinehart, 45 N.E.3d 427 (Ind. Ct. App. 2015), distinguishing *Rosales* and determining that the jury instruction given in a medical malpractice case was proper because it "did not include any confusing factual recitations, but rather amounted to a straight forward statement which focused on the proper

standard of care for finding medical negligence.”

The Committee has therefore revised this instruction to set forth the elements of negligence.

In element 1, the judge should use “by” if the plaintiff claims the defendant was at fault in one way, and should use “in one or more of the following ways” if the plaintiff claims the defendant was at fault in more than one way. If the plaintiff claims the defendant was negligent in more than one way, and the instruction lists each of the ways in which the defendant was negligent, the judge should be careful to separate those allegations with the word “or” rather than “and” to avoid mistakenly telling the jury that all allegations of negligence must be proven.

The judge can decide how specific to make the description of how plaintiff claims that the defendant was at fault, from a general description of the claim (“in the way he operated a motor vehicle”) to a specific list of all of plaintiff’s allegations (“in one of the following ways: (1) running the red light, or (2) exceeding the speed limit”).

A judge should further modify (or add to) this Instruction if the case involves other types of fault, such as gross negligence. The punitive damages elements are found in Instruction Nos. 737 to 745.

This instruction should be modified to reflect the factual situation of each case. If this instruction is given at the close of the evidence, it should set out allegations in the pleadings that are supported by the evidence; allegations with no supporting evidence should be omitted from the instruction.

The Committee has included both this instruction and the previous instruction in this chapter so that a judge can give either one (or both), based on his or her preference.

905 Burden of Proof for Plaintiff's Fault in a Comparative Fault Case

[Defendant] claims [plaintiff]'s own fault contributed to the [injury][harm][plaintiff] claims to have suffered and that [plaintiff]'s fault was a responsible cause of the [injury][harm].

[Defendant] has the burden of proving by the greater weight of the evidence that [plaintiff] was at fault.

Comments

The Committee believes that the Comparative Fault Act, Ind. Code ch. 34-51-2, retained the prior common law negligence rule that the defendant has the burden to prove plaintiff's contributory negligence. *See Koziol v. Vojvoda*, 662 N.E.2d 985 (Ind. Ct. App. 1996).

907 Comparative Fault—Definition

You must decide this case according to the Indiana law of comparative fault. The term “fault” refers to conduct that makes a person responsible, in some degree, for [a death][an injury][property damage]. The type[s] of fault at issue [is][are][*name types of fault at issue*].

Comments

This instruction should be used to inform the jury of the specific type of fault (*i.e.*, negligence) at issue in the action.

The Comparative Fault Act, Ind. Code ch. 34-51-2, contemplates that all types of fault be compared. Fault includes “any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.” Ind. Code § 34-6-2-45(b).

Enactment of a comparative fault statute which subjects a broad range of negligent conduct, even willful and wanton misconduct, to comparative treatment, reflects a legislative determination that fairness is best achieved by a relative assessment of the parties’ respective conduct. *Booker, Inc. v. Morrill*, 639 N.E.2d 358 (Ind. Ct. App. 1994); *see also Marlow v. Better Bars, Inc.*, 45 N.E.3d 1266 (Ind. Ct. App. 2015).

Under the Comparative Fault Act, the definition of “fault” includes the unreasonable failure to avoid an injury or mitigate damages. For a discussion on the failure to mitigate damages as fault, *see* Instruction No. 935 cmt.; *Medlock v. Blackwell*, 724 N.E.2d 1135 (Ind. Ct. App. 2000); *Deible v. Poole*, 691 N.E.2d 1313 (Ind. Ct. App. 1998), *adopted by* 702 N.E.2d 1076 (Ind. 1998).

As of July 1, 1995, product liability cases fall under comparative fault analysis, although the definition of “fault” for purposes of product liability cases differs from the definition of fault in the Comparative Fault Act. *Compare* Ind. Code § 34-6-2-45 *with* Ind. Code § 34-20-8-1.

Indiana Code § 34-6-2-45(b) specifies that the Comparative Fault Act covers all types of fault (including intentional acts); thus instructions for cases involving both negligent and intentional acts can include the comparative fault verdict forms, which can name the intentional actors as parties or nonparties, depending on the circumstances of the case.

909 Negligence—Definition

Negligence is the failure to use reasonable care.

A person may be negligent by acting or by failing to act. A person is negligent if he or she does something a reasonably careful person would not do in the same situation, or fails to do something a reasonably careful person would do in the same situation.

Comments

Negligence consists of the failure to use reasonable care, due care, or ordinary care, which is measured by the care a person of reasonable prudence would ordinarily exercise under like conditions and circumstances. *Central Transport, Inc. v. Great Dane Trailers, Inc.*, 423 N.E.2d 675 (Ind. Ct. App. 1981); *Southern Ry. Co. v. Harpe*, 223 Ind. 124, 58 N.E.2d 346 (1944); *Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 38 N.E.2d 257 (1941); *Cleveland, C., C. & St. L. Ry. Co. v. Jones*, 51 Ind. App. 245, 99 N.E. 503 (1912).

Negligence is comprised of three elements: (1) a duty on the part of the defendant to conform his conduct to the standard of care necessitated by the relationship; (2) a breach of that duty; and (3) injury that the plaintiff suffered as a result of that failure. *Benton v. City of Oakland City*, 721 N.E.2d 224 (Ind. 1999); *Dibortolo v. Metropolitan School Dist.*, 440 N.E. 2d 506 (Ind. Ct. App. 1982).

When found to exist, the duty to exercise reasonable care under the circumstances never changes; however, the standard of conduct required to measure up to that duty varies depending upon the particular circumstances. *Franklin v. Benock*, 722 N.E.2d 874 (Ind. Ct. App. 2000). *Clyde E. Williams & Assoc. v. Boatman*, 375 N.E.2d 1138, 1141 (Ind. Ct. App. 1978), discusses the issue of duty in the context of jury instructions:

While it is clear that the trial court must determine if an existing relationship gives rise to a duty, it must also be noted that a factual question may be interwoven with the determination of the existence of a relationship, thus making the ultimate existence of a duty a mixed question of law and fact. This dichotomy presents a trial court with a difficult problem in the drafting of instructions.

In *Clyde E. Williams & Assoc.*, the jury was instructed to consider whether the defendant had a duty, but was not given any direction about how to make that determination. The Court of Appeals stated that "it would be proper to instruct the jury alternatively that if it should find a certain set of facts, then a duty exists; however, should the jury reach a different factual conclusion, then no duty would exist." *Clyde E. Williams & Assoc.*, 375 N.E.2d at 1141. This duty question may arise, for example, in the context of premises liability where certain duties apply based on the status of the person on the property. *Clyde E. Williams & Assoc.*, 375 N.E.2d at 1141.

911 Reasonable Care—Definition

Reasonable care means being careful and using good judgment and common sense.

Comments

Negligence consists of the failure to use reasonable care, due care, or ordinary care, which is measured by the care a person of reasonable prudence would ordinarily exercise under like conditions and circumstances. *Central Transport, Inc. v. Great Dane Trailers, Inc.*, 423 N.E.2d 675 (Ind. Ct. App. 1981); *Southern Ry. v. Harpe*, 223 Ind. 124, 58 N.E.2d 346 (1944); *Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 38 N.E.2d 257 (1941); *Cleveland, C., C. & St. L. Ry. v. Jones*, 51 Ind. App. 245, 99 N.E. 503 (1912).

When found to exist, the duty to exercise reasonable care under the circumstances never changes; however, the standard of conduct required to measure up to that duty varies depending upon the particular circumstances. *Franklin v. Benock*, 722 N.E.2d 874 (Ind. Ct. App. 2000).

In Indiana there are no degrees of care. The use of such terms as slight care, great care, highest degree of care, or other like expressions in instructions as indicating the quantum of care the law exacts under special conditions and circumstances is misleading. *Thompson v. Ashba*, 122 Ind. App. 58, 102 N.E.2d 519 (1951); *Midwest Motor Coach Co. v. Elliott*, 95 Ind. App. 64, 182 N.E. 541 (1932).

A person with a mental disability is generally held to the same standard of care as that of a reasonable person under the same circumstances without regard to the person's capacity to control or understand the consequences of his or her actions. See Restatement 2d Torts § 283B (1965); *Creasy v. Rusk*, 730 N.E.2d 659, 667 (Ind. 2000). In *Creasy*, the Supreme Court balanced three factors to determine whether an individual owes a duty to another (the relationship between the parties, whether the harm to the person injured was reasonable foreseeable, and public policy concerns) and held that an Alzheimer patient owed no duty of care to a nursing home assistant who was injured when the patient kicked her.

For the standard of care of children, see Instruction No. 1129 on contributory negligence of children and Instruction No. 927 on comparative fault of children.

913 Willful or Wanton Misconduct—Definition

“Wanton or willful” misconduct is an intentional [act][failure to act] done with reckless disregard of probable injury to a person, when the defendant knew of that probability [and, if the defendant failed to act, (he)(she) had the opportunity to avoid the risk].

Comments

Indiana Code § 34-6-2-45(b) includes “willful or wanton misconduct” in the definition of fault, which results in comparing a party’s willful or wanton misconduct against other parties’ or nonparties’ conduct. This abrogates a line of Indiana decisions that held that, if a defendant’s conduct was willful or wanton misconduct, the plaintiff’s contributory negligence did not bar plaintiff’s recovery or reduce plaintiff’s recovery to any extent. *Robbins v. McCarthy*, 581 N.E.2d 929 (Ind. Ct. App. 1991); *Booker, Inc. v. Morrill*, 639 N.E.2d 358 (Ind. Ct. App. 1994); *see also Northern Ind. Pub. Serv. Co. v. Sharp*, 790 N.E.2d 462 (Ind. 2003) (in a comparative fault case, contributory negligence may reduce or bar plaintiff’s recovery even if the defendant was grossly negligent).

Willful and wanton misconduct consists of either: “(1) an intentional act done with reckless disregard of the natural and probable consequence of injury to a known person under the circumstances known to the actor at the time; or (2) an omission or failure to act when the actor has actual knowledge of the natural and probable consequence of injury and has opportunity to avoid that risk.” *Taylor v. Duke*, 713 N.E.2d 877, 882 (Ind. Ct. App. 1999). This conduct is comprised of two elements: (1) the defendant’s knowledge of an impending danger or consciousness of misconduct calculated to result in probable injury, and (2) the defendant’s conduct must have exhibited an indifference to the consequences of the act. *Witham v. Norfolk & W. R. Co.*, 561 N.E.2d 484, 486 (Ind. 1990); *Nesvig v. Town of Porter*, 668 N.E.2d 1276, 1283 (Ind. Ct. App. 1996).

914 Gross Negligence—Definition

“Gross negligence” is a voluntary [act][failure to act] done with reckless disregard of the consequences to another person.

Comments

This definition was taken from the case of *Northern Ind. Pub. Serv. Co. v. Sharp*, 790 N.E.2d 462 (Ind. 2003).

915 Reckless Conduct—Definition

A person acts recklessly when [he][she] disregards a substantial risk of danger that either is known or would be apparent to a reasonable person in the same position. The conduct must be highly unreasonable or a significant departure from reasonable care.

Comments

Indiana Code § 34-6-2-45(b) includes reckless acts or omissions in the definition of fault, which results in comparing a party's recklessness against other parties' or nonparties' conduct.

A person acts recklessly if he does an act, or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know that his conduct creates an unreasonable risk of physical harm to another, and that risk is substantially greater than that which is necessary to make his conduct negligent. *Mark v. Moser*, 746 N.E.2d 410, 422 (Ind. Ct. App. 2001) (*disapproved on other grounds by Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011)). Recklessness differs from intentional wrongdoing in that while the act must be intended by the actor in order to be considered reckless, the actor does not intend the harm that results from the act. *Mark*, 746 N.E.2d at 422 (*disapproved on other grounds by Pfenning*, 947 N.E.2d 392).

If driving while intoxicated is willful and wanton per se, it is also reckless per se. *Obremski v. Henderson*, 487 N.E.2d 827, 830 (Ind. Ct. App. 1986).

Voluntary co-participants in sports activities assume the inherent and foreseeable dangers of the activity and cannot recover for injury unless it can be established that the other participant either intentionally caused the injury or engaged in conduct so reckless as to be totally outside the range of ordinary activity involved in the sport. *Mark*, 746 N.E.2d at 420 (*disapproved on other grounds by Pfenning*, 947 N.E.2d 392).

917 Responsible Cause (Proximate Cause)—Definition

A person's conduct is legally responsible for causing [an injury][property damage][a death] if:

- (1) the [injury][property damage][a death] would not have occurred without the conduct, and
- (2) the [injury][property damage][a death] was a natural, probable, and foreseeable result of the conduct.

This is called a “responsible cause.”

[There can be more than one responsible cause for an injury.]

Comments

Scholars identify the use of legal jargon and arcane legalese as the most serious flaws of contemporary jury instructions. John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1209 (2002). In fact, in one study of 14 jury instructions, the proximate cause instruction produced proportionally the most misunderstanding among laypersons. The study revealed that jurors mistake “proximate cause” for “approximate cause,” “estimated cause,” or some fabrication. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979); see also Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L.J. 456, 468 (1962) (“proximate cause” is frequently misinterpreted to mean “probable” or “approximate cause”); James D. Wascher, *The Importance of Juries: The Long March Toward Plain English Jury Instructions*, 19 Chicago Bar Ass’n Record 50, 50–51 (2005) (a Chicago judge reported that he presided over a trial in which the jury sent him a note asking whether proximate cause meant “it’s pretty close to the cause”).

Prosser and Keeton say that proximate cause is “is an unfortunate word, which places entirely the wrong emphasis on the factor of physical or mechanical closeness.” Prosser & Keeton, *The Law of Torts* § 42. They even imply that it was a sin to have coined the term “proximate cause” in the first place. Prosser & Keeton, *The Law of Torts* § 42. (“The word ‘proximate’ is a legacy of Lord Chancellor Bacon, who in his time committed other sins.”) The Committee has determined that use of a term so likely to be misunderstood is against the policy behind clear jury instructions.

There are two types of causation in a negligence case—causation in fact and proximate cause. See, e.g., Prosser & Keeton, *The Law of Torts* §§ 41 (causation in fact), 42 (proximate cause) (5th ed. 1984). Causation in fact is the threshold question of whether “but for” the defendant’s negligent conduct, plaintiff’s harm would not have occurred. Or, to put it another way, plaintiff’s harm would not have occurred without the defendant’s negligent conduct. *Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981) (citing W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971); 21 I.L.E. Negligence § 62 (1959)). Because the consequences of an act go forward to eternity and back before the dawn of human events, there must also be “some reasonable connection between the act or omission

of the defendant and the damage which the plaintiff has suffered.” Prosser & Keeton, *The Law of Torts* § 41. This is proximate cause, and it boils down to “whether the conduct has been so significant and important a cause that the defendant should be legally responsible.” Prosser & Keeton, *The Law of Torts* § 41. Prosser and Keeton therefore suggest that either “responsible cause” or “legal cause” would be a more appropriate term. Prosser & Keeton, *The Law of Torts* § 41. Because use of the term “legal cause” might suggest to the jury that there could also be an “illegal cause,” the Committee selected “responsible cause.”

The Indiana Supreme Court has held that a proximate cause instruction is not *required* to refer to “but for” causation, “so long as the instructions as a whole adequately convey the law in this area.” *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 301 (Ind. 2009). To ensure that the instructions as a whole *do* adequately convey both proximate cause and causation in fact, the Committee has included both concepts in this one instruction. Subpart (1) of the instruction (“the injury would not have occurred without the conduct”) instructs on causation in fact. And because the Indiana Supreme Court has explained proximate cause as the natural and probable consequence of the conduct, subpart (2) of the instruction (“the injury was a natural and probable result of the conduct”) instructs on proximate cause. “A negligent act is said to be the proximate cause of an injury ‘if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.’ ” *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003) (quoting *Bader v. Johnson* 732 N.E.2d 1212, 1218 (Ind. 2000)).

Plaintiff in a negligence action has the burden of proving causation in fact by a preponderance of the evidence. *Turner v. Davis*, 699 N.E.2d 1217 (Ind. Ct. App. 1998) (causation in fact); *Carter v. Aetna Life Ins. Co.*, 217 Ind. 282, 27 N.E.2d 75 (1940) (proximate cause). What is the proximate cause of the injury is ordinarily a question of fact for the jury that becomes a question of law when only a single conclusion can be drawn from the facts. *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101 (Ind. Ct. App. 1999).

The court is not required to repeat the substance of an instruction defining proximate cause, and outlining the necessity of establishing it, in every general instruction relating to the subject of negligence. *Swallow Coach Lines, Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938).

The “conduct” discussed in this Instruction includes acts and omissions. *See, e.g.*, Instruction Nos. 909 and 1107.

There can be more than one responsible cause for an injury. *See, e.g.*, *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006) (“An injury may have more than one proximate cause.”); *Board of Comm’rs v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992) (“There may be more than one proximate cause of an event.”); *Krohn v. Shidler*, 140 Ind. App. 175, 185 (1966) (“It is not necessary that such negligence be the sole proximate cause.”). The bracketed sentence about multiple responsible causes should be given when it is an issue in the case.

918 Foreseeable—Defined

[An injury][Property damage][A death] is “foreseeable” when a person should realize that [his][her] act or failure to act might cause harm.

Comments

In the context of proximate/responsible cause, the question is whether the injury “is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.” *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 108 (Ind. 2002) (citing *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000)). “The determination of what is reasonably foreseeable is not judged by the subjective opinions of those involved, but is based upon the standard of due care in avoiding a result which might reasonably have been anticipated in the ordinary experience of people.” *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 917–18 (Ind. Ct. App. 2001) (citing *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101, 1105 (Ind. Ct. App. 1999)). When some harm is foreseeable, a person is responsible for any injury even if the extent of the injury was unforeseeable. *Bolin v. Wingert*, 764 N.E.2d 201, 207–08 (Ind. 2002). “If the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor’s negligence.” *Hampton v. Moistner*, 654 N.E.2d 1191, 1194 (Ind. Ct. App. 1995).

919 Intervention of Outside Cause

Sometimes an unrelated event breaks the connection between a defendant's negligent action and the injury a plaintiff claims to have suffered. If this event was not reasonably foreseeable, it is an "intervening cause."

When an intervening cause breaks the connection between a defendant's negligent act and a plaintiff's injury, a defendant's negligent act is no longer a "responsible cause" of that plaintiff's injury.

Comments

In general, a defendant's act is a proximate cause of an injury if the injury is the natural and probable consequence of the act and should have been reasonably foreseen and anticipated in light of the circumstances. *Scott v. Retz*, 916 N.E.2d 252, 257–58 (Ind. Ct. App. 2009). The chain of proximate causation can be broken if an independent agency intervenes between the defendant's negligence and the resulting injury. *Scott*, 916 N.E.2d at 257. The key to determining whether an intervening agency has broken the original chain of causation is whether, under the circumstances, it was reasonably foreseeable that the agency would intervene in such a way as to cause the resulting injury." *Scott*, 916 N.E.2d at 257; *see also Conder v. Hull Lift Truck, Inc.*, 435 N.E.2d 10, 14 (Ind. 1982). The analysis has three factors—whether the intervening actor: (1) is independent from the original actor, (2) has complete control over the instrumentality of the harm, and (3) is in a better position than the original actor to prevent the harm. *Scott*, 916 N.E.2d at 258 *but see Collins v. Manheim Remarketing, Inc.*, 2016 U.S. Dist. LEXIS 19377, at *15, (S.D. Ind., Feb. 18, 2016), (affirming the principles of *Scott* but also finding that the three factors the court considered in *Scott* do not comprise an exclusive list of relevant considerations in determining superseding and proximate causation); *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 108 (Ind. 2002), also lists factors to consider in the determination of superseding cause. *Control Techniques* also states:

The doctrines of causation and foreseeability impose the same limitations on liability as the "superseding cause" doctrine. . . . A superseding cause is, by definition, one that is not reasonably foreseeable. As a result, the doctrine in today's world adds nothing to the requirement of foreseeability that is not already inherent in the requirement of causation.

Control Techniques, Inc. v. Johnson, 762 N.E.2d at 108. This instruction is, therefore, not required; trial courts may, however, elect to give it if it would aid the jury in determining liability. *Control Techniques, Inc.*, 762 N.E.2d at 110.

Because the Comparative Fault Act did not change the standard for imposing liability—it merely altered the apportionment of damages flowing from that liability—the Act did not affect the doctrine of superseding cause. *Control Techniques, Inc.*, 762 N.E.2d at 109. To say there is a "superseding cause" foreclosing one actor's liability is to say in comparative fault terms that the original actor did not cause the harm and receives zero share of any liability. *Control Techniques, Inc.*, 762 N.E.2d at 109.

921 Incurred Risk/Assumed Risk—Comparative Fault Only

[Defendant] claims [plaintiff] knew of a specific danger, understood the risk [he][she][it] faced, and voluntarily exposed [herself][himself][itself] to the danger. In other words, [defendant] claims [plaintiff] voluntarily [incurred][assumed] the risk.

To prove [plaintiff][incurred][assumed] the risk, [defendant] must prove by the greater weight of the evidence that:

- (1) [plaintiff] knew and appreciated the specific risk; and
- (2) [plaintiff] voluntarily accepted the risk.

If you decide that [plaintiff][incurred][assumed] the risk, then that conduct is fault that you should assess against [plaintiff].

Comments

The term “incurred risk” has been used interchangeably with “assumed risk” in case opinions. “Assumed risk” differs from “incurred risk,” if at all, only in that assumed risk arises where there is a contractual relationship. *Alexandria v. Allen*, 552 N.E.2d 488 (Ind. Ct. App. 1990); *Kroger Co. v. Haun*, 177 Ind. App. 403, 379 N.E.2d 1004, 1008 n.2 (1978) (citing *Coleman v. De Moss*, 144 Ind. App. 408, 246 N.E.2d 483 (1969)).

Incurred risk is not a complete defense under the Comparative Fault Act. *Heck v. Robey*, 659 N.E.2d 498, 504 (Ind. 1995). It remains unclear to what extent the doctrine exists (as something other than a complete defense) under the comparative fault scheme. The Supreme Court has said that the “notion of incurred or assumed risk has largely become obsolete in an era of comparative fault.” *Spar v. Cha*, 907 N.E.2d 974, 980 (Ind. 2009) (internal quotation marks omitted); see also *Baker v. Osco Drug*, 632 N.E.2d 794 (Ind. Ct. App. 1994) (declining to hold that the Act abolished incurred risk; holding that, on the specific facts of that case, an incurred risk defense would trigger the apportionment principles of comparative fault).

The Indiana Supreme Court has delineated four types of incurred or assumed risk:

- (1) Express: plaintiff has given express consent to relieve defendant of the duty to use ordinary care and agrees to take his chances of injury from a known or possible risk.
- (2) Implied primary: plaintiff has voluntarily entered into a relation with defendant which plaintiff knows to involve risk, so that plaintiff is deemed to impliedly agree to relieve defendant of the duty to use ordinary care. For example, a spectator at a baseball game consents to the lack of precautions against being hit by the ball.
- (3) Implied secondary: plaintiff is aware of the risk caused by defendant’s negligence, and proceeds or continues to voluntarily encounter it. For example, an independent contractor who knows his principal has given him a machine in dangerous condition but continues to work with it consents to injury caused by the machine.
- (4) Unreasonable: plaintiff’s conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence.

Spar, 907 N.E.2d at 980 (citing Restatement 2d Torts § 496A cmt. c (1965); W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 68, at 480–81, 496–97 (5th ed. 1984)). The first three categories are predicated on plaintiff's express or implied consent, and under Indiana law, that consent "must be based on actual knowledge of the risk, not merely 'general awareness of a potential for mishap.'" *Spar*, 907 N.E.2d at 981 (quoting *Clark v. Wiegand*, 617 N.E.2d 916, 918 (Ind. 1993) (quoting *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552, 554 (Ind. 1987))).

Because express and implied primary incurred risk negate the duty of care, they negate an element of negligence, and therefore do "not look much like an orthodox affirmative defense." *Spar*, 907 N.E.2d at 981 (quoting 1 Dan B. Dobbs, *The Law of Torts*, § 212 (2001)). Although these two forms of assumption of risk may not require pleading as an affirmative defense under Trial Rule 8, the burden of proof to establish the plaintiff's consent is on the defendant. *Spar*, 907 N.E.2d at 981 (citing Dobbs § 212 n.4; see also Restatement 2d Torts § 496G cmt. c).

Implied secondary assumption of risk does not negate the defendant's duty of care; it asserts the plaintiff's conduct as a defense to the defendant's negligence or breach and therefore is a classic affirmative defense. *Spar*, 907 N.E.2d at 981 (citing *Blackburn v. Dorta*, 348 So. 2d 287, 290 (Fla. 1977)).

The essence of incurred risk is conscious, deliberate, and intentional action with knowledge of the circumstances. *Power v. Brodie*, 460 N.E.2d 1241, 1243 (Ind. Ct. App. 1984). It requires much more than the general awareness of a potential for mishap; it contemplates acceptance of a specific risk about which plaintiff actually knows. *Power*, 460 N.E.2d at 1243; see also *Hopper v. Carey*, 716 N.E.2d 566 (Ind. Ct. App. 1999); *Kostidis v. General Cinema Corp.*, 754 N.E.2d 563, 571 (Ind. Ct. App. 2001). Incurred risk also involves a mental state of venturousness on plaintiff's part. *Clark*, 617 N.E.2d 916.

Assumed risk is generally a question of fact for the trier of fact and may be found as a matter of law "only if the evidence is without conflict and the sole inference to be drawn is that the plaintiff (a) had actual knowledge of the specific risk, and (b) understood and appreciated the risk." *Alexandria v. Allen*, 552 N.E.2d 488, 497 (Ind. Ct. App. 1990) (quoting *Stainko v. Tri-State Coach Lines, Inc.*, 508 N.E.2d 1362, 1364 (Ind. Ct. App. 1987)).

923 Nonparty

A defendant may identify as a “nonparty” any person the defendant claims was at fault and caused any or all of the plaintiff’s claimed damages.

In this case, [defendant] has named [nonparty] as a nonparty.

Comments

Under the Comparative Fault Act, final fault percentages may be allocated only to plaintiffs, defendants, and “nonparties.” See Ind. Code §§ 34-51-2-7, -8. “Nonparty” is defined as “a person who caused or contributed to cause the alleged injury, death, or damage to property but who has not been joined in the action as a defendant.” Ind. Code § 34-6-2-88. Thus, the nonparty defense is not limited to instances where the named nonparty is or may be liable to the plaintiff; the defense may also be used where the nonparty contributed to cause the harm. *Bulldog Battery Corp. v. Pica Invs.*, 736 N.E.2d 333 (Ind. Ct. App. 2000).

A plaintiff’s recovery under the Comparative Fault Act must not be diminished by the percentage of fault of unidentified nonparties. A defendant must specifically name a nonparty to maintain his claim that the nonparty’s percentage of fault should be determined. *Cornell Harbison Excavating, Inc. v. May*, 546 N.E.2d 1186 (Ind. 1989). The rule requiring identification of nonparties does not preclude the introduction of otherwise competent and relevant evidence that the conduct of some unnamed third party was the sole efficient proximate cause of the plaintiff’s injuries or rendered the defendant’s conduct not negligent under the circumstances. *Kveton v. Siade*, 562 N.E.2d 461 (Ind. Ct. App. 1990). Such evidence may be argued to the jury as bearing on either the elements of the plaintiff’s claim or the burden of proof as against the defendant. *Kveton*, 562 N.E.2d at 464. The court’s instructions must not, however, direct the jury’s attention to the unnamed nonparty’s actions and tell them that they may consider whether those actions were the proximate cause of the collision. *Kveton*, 562 N.E.2d at 464; see also *Lueder v. Northern Ind. Pub. Serv. Co.*, 683 N.E.2d 1340, 1344 (Ind. Ct. App. 1997).

Although the definition of “nonparty” does not preclude named parties from reverting to nonparty status after being dismissed following settlement, *Koziol v. Vojvoda*, 662 N.E.2d 985 (Ind. Ct. App. 1996), a party dismissed from the suit does not automatically become a “nonparty,” *Bowles v. Tatom*, 546 N.E.2d 1188 (Ind. 1989). To change the dismissed party’s status, defendant should object to the dismissal or plead a nonparty defense. *Bowles*, 546 N.E.2d 1188. When multiple defendants are sued and plaintiff enters into settlement agreements with some of the defendants who are dismissed with prejudice, the trial court may grant leave to remaining defendants to amend their answers to raise the nonparty defense. *Gilliam v. Contractors United*, 648 N.E.2d 1236 (Ind. Ct. App. 1995).

A defendant who suffers judgment in a tort case is not entitled to credit for money paid by a settling co-defendant who has not been added back under the nonparty provisions of the Comparative Fault Act. *Mendenhall v. Skinner & Broadbent Co.*, 728 N.E.2d 140 (Ind. 2000). The ability of courts to implement the common law policy of credit during an age of litigation under the Comparative Fault Act is best served by a rule that obliges defendants to name the settling nonparty if they are to

seek credit for the settlement. *Mendenhall*, 728 N.E.2d 140. Moreover, where defendants are severally liable, a comparative fault defendant who goes to trial does not get credit for amounts paid by nonparty defendants with the plaintiff. *R.L. McCoy v. Jack*, 772 N.E.2d 987 (Ind. 2002).

Defendant bears the burden of proving a nonparty defense and must plead it as an affirmative defense. Ind. Code § 34-51-2-15. If a nonparty defense has been raised, therefore, this instruction must be considered in conjunction with Instruction No. 903.

Bankrupt people or entities can be named as non-parties because the proportional allocation of fault to a bankrupt nonparty under the Comparative Fault Act is not an action or proceeding against the debtor in contravention of automatic stay provisions of the federal bankruptcy law. *Bondex Int'l v. Ott*, 774 N.E.2d 82 (Ind. Ct. App. 2002).

925 Defendant Takes Plaintiff as He Finds Him

[Defendant] is not excused from responsibility just because [plaintiff] had [describe physical or mental condition] at the time of [the collision][the incident][describe event] that made [him][her] more likely to be injured.

Comments

This instruction applies to the “eggshell skull” plaintiff. W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 43, p. 291–92 (5th ed. 1984). A defendant takes his plaintiff as he finds him. *Morton v. Merrillville Toyota, Inc.*, 562 N.E.2d 781, 785 (Ind. Ct. App. 1990). This includes when the plaintiff has osteoporosis, hemophilia, or another similar condition.

Taking your plaintiff as you find him includes liability for injuries resulting from a condition of plaintiff about which defendant did not know nor should have known. *Brokers, Inc. v. White*, 513 N.E.2d 200 (Ind. Ct. App. 1987). When some injury was foreseeable and the defendant’s negligence proximately caused the aggravated injury, recovery for an injury is permitted, even if its ultimate extent was unforeseeable. *Bolin v. Wingert*, 764 N.E.2d 201, 207–08 (Ind. 2002); see also *Ryan v. Brown*, 827 N.E.2d 112, 121 (Ind. Ct. App. 2005).

926(A) Pre-existing Conditions; Aggravation

A pre-existing condition is a [physical][mental] condition that existed before [the collision][the incident][*describe event*].

[*Plaintiff*] may recover damages for the extent that [*defendant*] aggravated [*plaintiff*]'s [*specify pre-existing condition*].

[*Plaintiff*] cannot, however, recover damages for [*specify pre-existing condition*] itself.

Comments

This instruction should only be given if the facts of the case warrant it.

926(B) Post-Incident Conditions; Aggravation

[Plaintiff] is [also] not entitled to recover damages for any condition that occurred after, and was not caused by, [the collision][the incident][describe event].

Comments

This instruction should only be given if the facts of the case warrant it.

927 Comparative Fault—Children

[Child] was _____ years old at the time of the incident.

Child under the age of 7 years

A child under the age of seven (7) cannot be held legally responsible for [his][her] actions. Therefore, you cannot decide that a child under seven years of age was at fault.

Child between the ages of 7 and 14 years

A child between the ages of seven (7) and fourteen (14) must use the same care that a reasonably careful child of the same age, knowledge, judgment, and experience would use in the same situation.

Child over age 14 years

[Absent special circumstances], a child over the age of fourteen (14) must use the same care as an adult.

Comments

Indiana has a three-tiered analysis for determining the contributory negligence of children: (1) children under the age of 7 years are conclusively presumed to be incapable of negligence, (2) children from 7 to 14 are rebuttably presumed to be incapable of negligence, and children must use the care that a child of similar age, knowledge, judgment, and experience would use under the circumstances, and (3) absent special circumstances, children over the age of fourteen are charged with the standard of care of an adult. *Creasy v. Rusk*, 730 N.E.2d 659 (Ind. 2000); *Smith v. Diamond*, 421 N.E.2d 1172, 1177–79 (Ind. Ct. App. 1981).

Whether a child was contributorily negligent is generally a question of fact for the jury to decide. *See, e.g., Maldonado v. Gill*, 502 N.E.2d 1371, 1373 (Ind. Ct. App. 1987).

For a discussion of the development of law in this area and a comparison with the law in other jurisdictions, *see Smith*, 421 N.E.2d 1172.

929 Fault of a Parent

A child is not responsible for [his][her][parent's][guardian's][custodian's] conduct. Therefore, if you decide that [parent, guardian, or custodian] was at fault, you may not decide that [child] was at fault for [parent, guardian, or custodian]'s conduct.

Comments

Common law negligence cases indicate that a parent's, guardian's, or custodian's negligence is not to be imputed to the child. *J. F. Darmody Co. v. Reed*, 60 Ind. App. 662, 111 N.E. 317 (1916); *Jeffersonville v. McHenry*, 22 Ind. App. 10, 53 N.E. 183 (1899); *Terre Haute, I. & E. Traction Co. v. Stevenson*, 73 Ind. App. 294, 126 N.E. 34 (1920); *Evansville v. Senhenn*, 151 Ind. 42, 47 N.E. 634 (1897). This common law rule fits neatly within the comparative fault scheme—a parent can be named as a nonparty, which does not impute the parent's fault to the child, and the child could still recover based on the defendant's percentage of fault.

Comparative Fault

931 Sudden Emergency

[Plaintiff][Defendant] claims [he][she] was not at fault because [he][she] acted with reasonable care in an emergency situation. [Plaintiff][Defendant] was not at fault if [he][she] proves the following by the greater weight of the evidence:

- (1) [he][she] was faced with a sudden emergency;
- (2) [he][she] did not cause the emergency;
- (3) [he][she] did not have enough time to consider [his][her] options; and
- (4) [he][she] acted as a reasonably careful person would act when facing a similar emergency, even if a different course of action might later seem to have been a better choice.

Comments

The sudden emergency doctrine survived the adoption of the Comparative Fault Act. *Compton v. Pletch*, 580 N.E.2d 664 (Ind. 1991) (adopting 561 N.E.2d 803 (Ind. Ct. App. 1990)).

“In a negligence cause of action, the sudden emergency doctrine is an application of the general requirement that one’s conduct conform to the standard of a reasonable person. The emergency is simply one of the circumstances to be considered in forming a judgment about an actor’s fault. . . . The sudden emergency doctrine does not impose a lesser standard of care on a person presented with an emergency. The individual is still expected to respond to the situation as a reasonably prudent person under the circumstances.” *Willis v. Westerfield*, 839 N.E.2d 1179, 1184, 1186 (Ind. 2006) (citations omitted). *Willis* held that the sudden emergency doctrine is not an affirmative defense within the meaning of T.R. 8(C). Because the parties did not raise whether the instruction correctly stated the law, the Court expressed “no opinion as to the desirability of such an instruction or any other potential challenge to the specific language used in this case.” *Willis*, 839 N.E.2d at 1186.

After *Willis*, it is unclear whether the appellate courts favor a trial court’s instruction on sudden emergency. At least one Court of Appeals opinion questions the use of the instruction. *Yates v. Hites*, 102 N.E.3d 901, 909 (Ind. Ct. App. 2018). *But cf. Sullivan v. Fairmont Homes, Inc.*, 543 N.E.2d 1130, 1137 (Ind. Ct. App. 1989) (“If the court determines that these conditions have been met, the jury may be instructed that if it finds a reasonable person confronted with the same circumstances might have reacted in the same fashion, even though another course of conduct might have been more judicious, or safer, or might even have avoided the accident, it may still find the actor’s conduct not to be negligent.”)

Collins v. Rambo explains that the sudden emergency doctrine applies only in narrow circumstances. 831 N.E.2d 241 (Ind. Ct. App. 2005) (holding that the sudden emergency doctrine did not apply in a case in which the driver was following too closely behind another a vehicle). The cases outlining the doctrine recite three factual prerequisites to an instruction on the rule: (1) the actor must not have created or brought about the emergency through his own negligence, (2) the danger or peril confronting the actor must appear to be so imminent as to leave no

time for deliberation, and (3) the actor's apprehension of the peril must itself be reasonable. *See, e.g., Barnard v. Himes*, 719 N.E.2d 862 (Ind. Ct. App. 1999).

Cases have characterized the third factor as a requirement that the actor's conduct under the circumstances conform to that of an ordinarily prudent person under like or similar circumstances. *Bundy v. Ambulance Indianapolis Dispatch, Inc.*, 158 Ind. App. 99, 301 N.E.2d 791 (1973); *Stein v. Yung*, 475 N.E.2d 52 (Ind. Ct. App. 1985). Although earlier cases seemed to imply that the peril the actor sought to avoid must have been created by a party to the lawsuit or by some third person, the Court of Appeals has since held the peril may be created by inclement weather conditions or other natural circumstances. *Sullivan*, 543 N.E.2d at 1137.

The proponent of the sudden emergency doctrine bears the burden of proof. *Willis*, 839 N.E.2d at 1185.

932 Rescue

A person who has, through his [negligence][*other standard of care*], endangered the safety of another may be held liable for injuries sustained by a third person in attempting to save such other from injury.

You may hold [defendant] liable for [plaintiff]'s injuries if you find that:

1. [defendant][negligently][*other standard of care*] endangered [rescued person]
2. [plaintiff] attempted to prevent further harm to [rescued person],
3. [plaintiff]'s attempt was reasonable under the circumstances.

Comments

"One who has, through his negligence, endangered the safety of another may be held liable for injuries sustained by a third person in attempting to save such other from injury." *Neal v. Home Builders, Inc.*, 111 N.E.2d 280, 284 (1953). For the rescue doctrine to apply, the rescuer must in fact undertake physical activity in a reasonable and prudent attempt to rescue someone. *Lambert v. Parrish*, 492 N.E.2d 289, 291 (Ind. 1986).

933 Intoxication—No Excuse or Justification

An intoxicated person is held to the same standard of care as someone who is not intoxicated. Intoxication does not excuse or justify a person’s failure to act as a reasonably careful person.

Comments

This instruction should be used in traditional negligence cases. Indiana Code § 9-13-2-86 defines “intoxicated.”

Evidence a driver was intoxicated is sufficient to show wanton or willful misconduct within the meaning of Indiana’s guest statute. *Williams v. Crist*, 484 N.E.2d 576 (Ind. 1985); *see also Davis v. Stinson*, 508 N.E.2d 65 (Ind. Ct. App. 1987); *Booker, Inc. v. Morrill*, 639 N.E.2d 358 (Ind. Ct. App. 1994). The *Booker* court explained that, although a driver may have voluntarily and intentionally become intoxicated, that intentional act does not necessarily make the person’s conduct in causing the injury and loss intentional; the conduct causing the injury is the focus for the purpose of determining fault. *Booker*, 639 N.E.2d at 362.

935 Duty to Minimize (Mitigate) Post-Injury in Comparative Fault Cases

[Defendant] asserts that [plaintiff] failed to minimize [his][her] damages. [Defendant] has the burden of proving by the greater weight of the evidence that:

- (1) [plaintiff] failed to use reasonable care to minimize [his][her] damages; and
- (2) that failure caused an identifiable harm not attributable to the [defendant]'s negligent conduct.

Comments

“[T]he principle of mitigation of damages addresses conduct by an injured party that aggravates or increases the party’s injuries.” *Willis v. Westerfield*, 839 N.E.2d 1179, 1187 (Ind. 2006). Mitigation of damages can occur before the injury, for example, a plaintiff’s failure to use safety goggles while using a power saw. Mitigation of damages can also occur after the injury, for example, a plaintiff’s failure to use the eyedrops prescribed by her doctor to treat the injury caused by the power saw.

Mitigation of damages is not an affirmative defense to liability. *Kocher v. Getz*, 824 N.E.2d 671, 676 (Ind. 2005). Rather, failure to mitigate damages is an affirmative defense that may reduce the amount of damages a plaintiff is entitled to recover after liability has been found. *Willis*, 839 N.E.2d at 1187.

Pre-Injury Failure to Mitigate: Consider as Fault

The term “fault” for purposes of the Comparative Fault Act “includes . . . unreasonable failure . . . to mitigate damages.” Ind. Code § 34-6-2-45(b). The Indiana Supreme Court has interpreted the statutory definition of fault, however, to apply “only to a plaintiff’s conduct *before* an accident or initial injury.” *Kocher*, 824 N.E.2d at 674 (giving a plaintiff’s failure to wear safety goggles as an example of pre-injury failure to mitigate). In other words, a jury can consider as fault only the plaintiff’s pre-injury failure to mitigate damages.

Post-Injury Failure to Mitigate: Reduce Damages

While a plaintiff’s post-accident conduct that constitutes an unreasonable failure to mitigate damages is not to be considered in the assessment of fault, a plaintiff still “ ‘may not recover for any item of damage that [the plaintiff] could have avoided through the use of reasonable care.’ ” *Kocher*, 824 N.E.2d at 675 (quoting former Indiana Pattern Jury Instruction No. 11.120 (2003)). “Put simply, a plaintiff in a negligence action has a duty to mitigate his or her post-injury damages, and the amount of damages a plaintiff is entitled to recover is reduced by those damages which reasonable care would have prevented.” *Buhring v. Tavoletti*, 905 N.E.2d 1059, 1064 (Ind. Ct. App. 2009) (citing *Willis*, 839 N.E.2d at 1187). In other words, a jury can reduce the plaintiff’s final damages award based on the plaintiff’s post-injury failure to mitigate damages.

Because the Committee contemplates that jurors will consider pre-injury failure to mitigate as fault, this instruction focuses on post-injury failure to mitigate, and

should be given only when evidence of post-injury failure to mitigate is offered.

The defendant bears the burden of proving both elements of the affirmative defense of post-injury failure to mitigate damages: (1) that the plaintiff failed to exercise reasonable care to mitigate his or her post-injury damages, and (2) that the plaintiff's failure to exercise reasonable care caused the plaintiff to suffer an identifiable item of harm not attributable to the defendant's negligent conduct. *Willis*, 839 N.E.2d at 1188.

It is not enough to establish that the plaintiff acted unreasonably. The defendant must establish resulting identifiable quantifiable additional injury, just as the plaintiff must prove harm resulting from the defendant's acts. When, as here, a defendant claims that after an accident a plaintiff unreasonably failed to follow medical advice, in order to establish a failure to mitigate, the defendant must also prove that the plaintiff's actions caused the plaintiff to suffer a discrete, identifiable harm arising from that failure, and not arising from the defendant's acts alone.

Willis, 839 N.E.2d at 1188.

Whether a post-injury failure to mitigate defense requires expert testimony to establish causation must be resolved on a case-by-case basis; trial courts should analyze whether a lay juror can determine that a particular item of harm was caused by a plaintiff's unreasonable post-injury disregard. *Willis*, 839 N.E.2d at 1188 (holding that trial court erred in giving a failure to mitigate instruction because defendant failed to carry his burden to prove that plaintiff's post-injury disregard of advice as to treatment increased her harm, and if so, by how much).

937 Violation of Statutory Duty as Fault

When the events in this case happened, [Indiana Code § _____][*ordinance number and name*] provided [in part] as follows: [*here set out applicable portions of statute or ordinance*].

If you decide from the greater weight of the evidence that a person violated [Indiana Code § _____][*ordinance number and name*], and that the violation was not excused, then you must decide that person was at fault.

Comments

A judge giving this instruction should also give Instruction Nos. 917 (responsible cause), 909 (negligence).

While a court may copy into an instruction pertinent parts of a statute and read them as a part of the written instructions, *Vandalia Coal Co. v. Moore*, 69 Ind. App. 311, 121 N.E. 685 (1919), judges should take care to ensure that the statute is comprehensible to jurors. When more than one statutory violation is alleged, the Committee recommends incorporating all statutory provisions in one instruction. If there is no evidence or inference of excuse for violating a statute, the clause relating to excuse should be omitted.

Generally, the violation of a statute or ordinance that imposes a duty is negligence per se toward those persons the law is designed to protect. *Zimmerman v. Moore*, 441 N.E.2d 690 (Ind. Ct. App. 1982). For the violation of a statute to be negligence per se, the statute must prescribe an absolute duty so that the jury need not consider the surrounding circumstances to determine whether the actor exercised reasonable care. *Peaches v. Evansville*, 180 Ind. App. 465, 389 N.E.2d 322 (1979). The statute must not have been enacted for a wholly different purpose than to prevent the alleged injury, and the statute must be designed to protect the class of people to which the plaintiff belongs. *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966).

Negligence per se does not necessarily mean liability per se because proximate cause must still be proven. *Blankenship v. Huesman*, 173 Ind. App. 98, 362 N.E.2d 850 (1977); *New York C. R. Co. v. Glad*, 242 Ind. 450, 179 N.E.2d 571 (1962). Judges should therefore give the responsible (proximate) cause instruction along with this instruction.

In addition, while a statutory violation is generally negligence per se, it is sometimes merely *prima facie* evidence of negligence, and whether a statutory violation is negligent conduct may become a jury question because circumstances may excuse technical violations. *Larkins v. Kohlmeyer*, 229 Ind. 391, 400, 98 N.E.2d 896, 900 (1951); *see also Phoenix Natural Res., Inc. v. Messmer*, 804 N.E.2d 842, 848 (Ind. Ct. App. 2004); *Wallace v. Hjelm*, 141 Ind. App. 686, 142 Ind. App. 686, 231 N.E.2d 862 (1967); *but see Hancock Truck Lines, Inc. v. Butcher*, 229 Ind. 36, 94 N.E.2d 537 (1950) (no error to instruct jury that statutory violation was negligence as a matter of law, when there was no evidence or inference of facts that would excuse such conduct); *Northern Ind. Transit, Inc. v. Burk*, 228 Ind. 162, 89 N.E.2d 905 (1950) (same).

939 Excuse from Statutory Violation

A person may be excused from failing to comply with [a statute][an ordinance] if [he][she] proves by the greater weight of the evidence that:

- (1) The [statute][ordinance] provided a specific excuse;
- (2) Compliance was impossible;
- (3) Noncompliance was excusable because of circumstances:
 - (a) beyond the person's control, and
 - (b) not the result of the person's negligence; or
- (4) The person who violated the [statute][ordinance] exercised reasonable care under the circumstances and desired to comply with the law.

Comments

While a statutory violation is generally negligence per se, it is sometimes merely *prima facie* evidence of negligence, and whether a statutory violation is negligent conduct may become a jury question, because circumstances may excuse technical violations. *Hill v. Gephart*, 54 N.E.3d 402 (Ind. Ct. App. 2016); *Larkins v. Kohlmeyer*, 229 Ind. 391, 400, 98 N.E.2d 896, 900 (1951); *see also Phoenix Natural Resources, Inc. v. Messmer*, 804 N.E.2d 842, 848 (Ind. Ct. App. 2004); *Wallace v. Hjelm*, 141 Ind. App. 686, 142 Ind. App. 686, 231 N.E.2d 862 (1967); *but see Hancock Truck Lines v. Butcher*, 229 Ind. 36, 94 N.E.2d 537 (1950) (no error to instruct jury that statutory violation was negligence as a matter of law, when there was no evidence or inference of facts that would excuse such conduct); *Northern Ind. Transit, Inc. v. Burk*, 228 Ind. 162, 89 N.E.2d 905 (1950) (same).

941 Comparative Fault—Apportionment—One Plaintiff/One Defendant

To decide if [plaintiff] is entitled to recover damages from [defendant], and if so, the amount of those damages, apportion the fault of [plaintiff], [defendant], and [identified nonpart(y)(ies)] on a percentage basis. Do this as follows:

First, if [defendant] is not at fault, return your verdict for [defendant] and against [plaintiff]; and deliberate no further. (*Use Verdict Form 5001(A).*)

If [defendant] is at fault, decide [defendant]’s percentage of fault, and the percentage of fault, if any, of [plaintiff] and [identified nonpart(y)(ies)] that caused [plaintiff]’s injuries. These percentages must total 100 percent. Do not apportion fault to any other person or entity.

Next, if [plaintiff]’s fault is greater than 50 percent, return your verdict for [defendant] and against [plaintiff] in this case, and deliberate no further. (*Use Verdict Form 5001(B).*)

However, if you decide that [plaintiff]’s fault is 50 percent or less, then:

- (1) Decide the total amount of [plaintiff]’s damages, if any. Do not consider fault when you decide this amount.
- (2) Multiply [plaintiff]’s total damages by [defendant]’s percentage of fault.
- (3) Return your verdict for [plaintiff] and against [defendant] in the amount of the product of that multiplication. (*Use Verdict Form 5001(C).*)

I will give you verdict forms that will help guide you through this process.

Comments

The committee strongly recommends use of Verdict Form No. 5001. The pattern instruction and verdict form have been drafted to complement each other.

Indiana Code § 34-51-2-7 discusses how to instruct the jury on comparative fault cases with a single defendant or multiple defendants treated as a single defendant. Although section 7 appears to require the jury to determine fault first before determining whether the defendant is negligent, cases have held to the contrary. If the jury determines the defendant is not negligent in the first instance, or his conduct was not the proximate cause of the injuries, there is no need for the jury to allocate fault between the parties. *Koziol v. Vojvoda*, 662 N.E.2d 985, 992 (Ind. Ct. App. 1996). The jury should not be required to first allocate fault before finding the defendant not negligent; such an exercise is not only meaningless but is also a waste of effort by the jury. *Evans v. Schenk Cattle Co.*, 558 N.E.2d 892, 896 (Ind. Ct. App. 1990); *see also Utley v. Healy*, 663 N.E.2d 229, 233 (Ind. Ct. App. 1996) (no error to give this instruction: “[I]f you find the Defendant is not at fault or that the Plaintiffs have failed to meet their burden of proof, then your verdict should be for the Defendant, you should sign Verdict Form C, and no further deliberation of the Jury is necessary.”).

Absent agency, joint venture, right of control, or unity of interest, the fault of the driver of a vehicle may not be imputed to the passenger. *Handrow v. Cox*, 575 N.E.2d 611, 614 (Ind. 1991).

943 Comparative Fault—Apportionment—One Plaintiff/Two Defendants

To decide if [plaintiff] is entitled to recover damages from [defendant one] or [defendant two] or both, and if so, the amount of those damages, apportion the fault of [plaintiff], [defendants], and [identified nonpart(y)(ies)] on a percentage basis. Do this as follows:

First, if [defendants] are not at fault, return your verdict for [defendants] and against [plaintiff]; and deliberate no further. (*Use Verdict Form 5003(A).*)

If [defendants] are at fault, decide [defendant]s' percentages of fault, and the percentage of fault, if any, of [plaintiff] and [identified nonpart(y)(ies)] that caused [plaintiff]'s injuries. These percentages must total 100 percent. Do not apportion fault to any other person or entity.

Next, if [plaintiff]'s fault is greater than 50 percent, return your verdict for [defendants] and against [plaintiff] in this case; and deliberate no further. (*Use Verdict Form 5003(B).*)

However, if you decide that [plaintiff]'s fault is 50 percent or less, then:

- (1) Decide the total amount of [plaintiff]'s damages, if any. Do not consider fault when you decide this amount.
- (2) Multiply [plaintiff]'s total damages by each [defendant]'s percentage of fault.
- (3) Return your verdict for [plaintiff] and against each [defendant] in the amount of the product of that multiplication. (*Use Verdict Form 5003(C).*)

I will give you verdict forms that will help guide you through this process.

Comments

The committee strongly recommends use of Verdict Form No. 5003. The pattern instruction and verdict form have been drafted to complement each other.

Indiana Code § 34-51-2-8 discusses how to instruct the jury on comparative fault cases with multiple defendants. Although section 7 appears to require the jury to determine fault first before determining whether the defendant is negligent, cases have held to the contrary. If the jury determines the defendant is not negligent in the first instance, or his conduct was not the proximate cause of the injuries, there is no need for the jury to allocate fault between the parties. *Koziol v. Vojvoda*, 662 N.E.2d 985, 992 (Ind. Ct. App. 1996). The jury should not be required to first allocate fault before finding the defendant not negligent; such an exercise is not only meaningless but is also a waste of effort by the jury. *Evans v. Schenk Cattle Co., Inc.*, 558 N.E.2d 892, 896 (Ind. Ct. App. 1990); *see also Utley v. Healy*, 663 N.E.2d 229, 233 (Ind. Ct. App. 1996) (no error to give this instruction: "[I]f you find the Defendant is not at fault or that the Plaintiffs have failed to meet their burden of proof, then your verdict should be for the Defendant, you should sign Verdict Form C, and no further deliberation of the Jury is necessary.").

944(A) Mixed Comparative Fault and Common Law Defendants—If All Parties Agree—Judge Calculates Judgment Against Each Defendant

To decide if [plaintiff] is entitled to recover damages from [comparative fault defendant] or [common law defendant] or both, and if so, the amount of those damages, apportion the fault of [plaintiff], [defendants], and [identified nonpart(y)(ies)] on a percentage basis. Do this as follows:

First, if neither [comparative fault defendant] nor [common law defendant] is at fault, return your verdict for [comparative fault defendant] and [common law defendant], and against [plaintiff], and deliberate no further. (*Use Verdict Form 5003(A).*)

If either [comparative fault defendant] or [common law defendant] is at fault, decide their percentages of fault, and the percentage of fault, if any, of [plaintiff] and [identified nonpart(y)(ies)] that caused [plaintiff]’s injuries. These percentages must total 100 percent. Do not apportion fault to any other person or entity.

Finally, decide the total amount of [plaintiff]’s damages, if any. Do not consider fault when you decide this amount. (*Use Verdict Form 5004.*)

Based on the law, the percentages of fault you allocate, and the total amount of damages in your verdict, I will calculate the amount of money, if any, [plaintiff] is entitled to recover against either of the defendants.

The law treats these defendants differently. The law requires that:

- (1) If [plaintiff]’s fault is greater than 50 percent, [plaintiff] cannot recover damages against either [comparative fault defendant] or [common law defendant].
- (2) If [plaintiff]’s fault is greater than 0 percent, [plaintiff] cannot recover damages against [common law defendant].

I will give you verdict forms that will help guide you through this process.

Comments

Ind. Code § 34-51-2-8 provides the manner in which the jury is to determine damages in a comparative fault case. When comparative fault principles collide with common law negligence principles, determining damages becomes exceedingly complicated and confusing for the jury. In cases involving both comparative fault and common law negligence defendants, therefore, it is recommended that the parties agree that the trial judge will calculate the damages against each defendant. If the parties so agree, this Instruction, along with Verdict Forms 5003(A) and 5004, should be given.

The parties and the judge should attempt to reach this agreement well before trial to avoid the problems of trying cases involving both sets of principles in a single trial. If the parties do not agree that the judge should calculate the damages against each defendant, the judge should instruct the jury using Instruction No. 944(B).

944(B) Mixed Comparative Fault and Common Law Defendants

The law requires you to use different methods to decide if [plaintiff] is entitled to recover damages from [comparative fault defendant] or [common law defendant] or both, and if so, the amount of those damages.

A. Deliberations as to [common law defendant]	B. Deliberations as to [comparative fault defendant]
<p>If you decide that [common law defendant] was not negligent, return your verdict for [common law defendant], and against [plaintiff], and deliberate no further as to [common law defendant]. (Use Verdict Form 5017.)</p> <p>If you decide that [plaintiff]’s own negligence contributed to the [injury][harm][plaintiff] claims to have suffered and that [plaintiff]’s negligence was a responsible cause of the [injury][harm], return your verdict for [common law defendant] and against [plaintiff] in this case, and deliberate no further as to [common law defendant]. (Use Verdict Form 5017.)</p> <p>However, if you decide that [common law defendant] was negligent, and that [plaintiff]’s own negligence did not contribute to the [injury][harm], then you must decide the amount of plaintiff’s damages caused by the negligence of [common law defendant] <u>without</u> comparing that negligence to the fault of any other defendant in this case. Return your verdict against [common law defendant] in that amount. (Use Verdict Form 5013.)</p>	<p>If you decide that [comparative fault defendant] is not at fault, return your verdict for [comparative fault defendant], and against [plaintiff], and deliberate no further as to [comparative fault defendant]. (Use Verdict Form 5001(A).)</p> <p>If [comparative fault defendant] is at fault, decide [his][her][its] percentage of fault, and the percentage of fault, if any, of [plaintiff], [common law defendant], and [identified nonpart(y)(ies)] that caused [plaintiff]’s injuries. These percentages must total 100 percent. Do not apportion fault to any other person or entity.</p> <p>If [plaintiff]’s fault is greater than 50 percent, return your verdict for [comparative fault defendant] and against [plaintiff] in this case; and deliberate no further. (Use Verdict Form 5003(B).)</p> <p>However, if you decide that [plaintiff]’s fault is 50 percent or less,</p> <div><p>(1) Decide the total amount of [plaintiff]’s damages, if any. Do not consider fault when you decide this amount.</p><p>(2) Multiply [plaintiff]’s total damages by [comparative fault defendant]’s percentage of fault.</p><p>(3) Return your verdict for [plaintiff] and against [comparative fault defendant] in the amount of the product of that multiplication. (Use Verdict Form 5003(C).)</p></div>

I will give you verdict forms that will help guide you through this process.

Comments

When comparative fault principles collide with common law negligence principles, determining damages becomes exceedingly complicated and confusing for the jury. In cases involving both comparative fault and common law negligence defendants, therefore, it is recommended that the parties agree that the trial judge will calculate the damages against each defendant. Instruction No. 944(A) was designed to be

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used when the parties so agree. The parties and the judge should attempt to reach this agreement well before trial to avoid the problems of trying cases involving both sets of principles in a single trial.

If the parties do not agree that the judge should calculate the damages against each defendant, the judge should instruct the jury using this Instruction.

945 Comparative Fault—Apportionment—Plaintiff and Spouse (Consortium Claim)

To decide if [plaintiff] is entitled to recover damages from [defendant], and if so, the amount of those damages, apportion the fault of [plaintiff], [defendant], and [identified nonpart(y)(ies)] on a percentage basis. Do this as follows:

First, if [defendant] is not at fault, return your verdict for [defendant] and against [name all plaintiffs]; and deliberate no further. (*Use Verdict Form 5005(A).*)

If [defendant] is at fault, decide [defendant]’s percentage of fault, and the percentage of fault, if any, of [plaintiff] and [identified nonpart(y)(ies)] that caused [plaintiff]’s injuries. These percentages must total 100 percent. Do not apportion fault to any other person or entity.

Next, if [plaintiff]’s fault is greater than 50 percent, return your verdict for [defendant] and against [name all plaintiffs] in this case; and deliberate no further. (*Use Verdict Form 5005(B).*)

However, if you decide that [plaintiff]’s fault is 50 percent or less, then:

- (1) Decide the total amount of [plaintiff]’s damages, if any. Do not consider fault when you decide this amount.
- (2) Multiply [plaintiff]’s total damages by [defendant]’s percentage of fault.
- (3) Return your verdict for [plaintiff] and against [defendant] in the amount of the product of that multiplication. (*Use Verdict Form 5005(C).*)

Also, if you decide that [plaintiff]’s fault is 50 percent or less, you must decide the damages, if any, you award to [plaintiff’s spouse]. To do this, you must:

- (4) Decide the total amount of [plaintiff’s spouse]’s damages, if any. Do not consider fault when you decide this amount.
- (5) Multiply [plaintiff’s spouse]’s total damages by [defendant]’s percentage of fault.
- (6) Return your verdict for [plaintiff’s spouse] and against [defendant] in the amount of the product of that multiplication. (*Use Verdict Form 5005(C).*)

I will give you verdict forms that will help guide you through this process.

Comments

The committee strongly recommends use of Verdict Form No. 5005. The pattern instruction and verdict form have been drafted to complement each other.

Indiana Code § 34-51-2-7 discusses how to instruct the jury on comparative fault cases with a single defendant or multiple defendants treated as a single defendant. Although section 7 appears to require the jury to determine fault first before determining whether the defendant is negligent, cases have held to the contrary. If the jury determines the defendant is not negligent in the first instance, or his conduct was not the proximate cause of the injuries, there is no need for the jury to allocate

fault between the parties. *Koziol v. Vojvoda*, 662 N.E.2d 985, 992 (Ind. Ct. App. 1996). The jury should not be required to first allocate fault before finding the defendant not negligent; such an exercise is not only meaningless but is also a waste of effort by the jury. *Evans v. Schenk Cattle Co., Inc.*, 558 N.E.2d 892, 896 (Ind. Ct. App. 1990); see also *Utley v. Healy*, 663 N.E.2d 229, 233 (Ind. Ct. App. 1996) (no error to give this instruction: “[I]f you find the Defendant is not at fault or that the Plaintiffs have failed to meet their burden of proof, then your verdict should be for the Defendant, you should sign Verdict Form C, and no further deliberation of the Jury is necessary.”).

This instruction is drafted for the most common type of derivative claim seen—a spouse’s loss of consortium claim—but can be modified for other derivative claims.

947 Comparative Fault—Apportionment—Two Plaintiffs Both Claimed at Fault

To decide if the plaintiffs, [plaintiff one] and [plaintiff two] are entitled to recover damages from [defendant], and if so, the amount of those damages, apportion the fault of [plaintiff one], [plaintiff two], [defendant], and [identified nonpart(y)(ies)] on a percentage basis. Do this as follows:

First, if [defendant] is not at fault, return your verdict for [defendant] and against [plaintiff one] and [plaintiff two]; and deliberate no further. (Use Verdict Form 5007(A).)

If [defendant] is at fault, decide [defendant]’s percentage of fault, and the percentage of fault, if any, of [plaintiff one], [plaintiff two], and [identified nonpart(y)(ies)] that caused [plaintiff one]’s and [plaintiff two]’s injuries. These percentages must total 100 percent. Do not apportion fault to any other person or entity.

Next, if either [plaintiff one]’s or [plaintiff two]’s fault is greater than 50 percent, return your verdict for [defendant] and against the plaintiff whose fault is greater than 50 percent, and deliberate no further as to that plaintiff. (Use Verdict Form 5007(B).)

However, if you decide that [plaintiff one]’s fault is 50 percent or less, then:

- (1) Decide the total amount of [plaintiff one]’s damages, if any. Do not consider fault when you decide this amount.
- (2) Multiply [plaintiff one]’s total damages by [defendant]’s percentage of fault.
- (3) Return your verdict for [plaintiff one] and against [defendant] in the amount of the product of that multiplication. (Use Verdict Form 5007(C).)

If you decide that [plaintiff two]’s fault is 50 percent or less, then:

- (4) Decide the total amount of [plaintiff two]’s damages, if any. Do not consider fault when you decide this amount.
- (5) Multiply [plaintiff two]’s total damages by [defendant]’s percentage of fault.
- (6) Return your verdict for [plaintiff two] and against [defendant] in the amount of the product of that multiplication. (Use Verdict Form 5007(C).)

I will give you verdict forms that will help guide you through this process.

Comments

The committee strongly recommends use of Verdict Form No. 5007. The pattern instruction and verdict form have been drafted to complement each other.

Indiana Code § 34-51-2-7 discusses how to instruct the jury on comparative fault cases with a single defendant or multiple defendants treated as a single defendant. Although section 7 appears to require the jury to determine fault first before determining whether the defendant is negligent, cases have held to the contrary. If the jury determines the defendant is not negligent in the first instance, or his conduct was not the proximate cause of the injuries, there is no need for the jury to allocate

fault between the parties. *Koziol v. Vojvoda*, 662 N.E.2d 985, 992 (Ind. Ct. App. 1996). The jury should not be required to first allocate fault before finding the defendant not negligent; such an exercise is not only meaningless but is also a waste of effort by the jury. *Evans v. Schenk Cattle Co., Inc.*, 558 N.E.2d 892, 896 (Ind. Ct. App. 1990); *see also Utley v. Healy*, 663 N.E.2d 229, 233 (Ind. Ct. App. 1996) (no error to give this instruction: “[I]f you find the Defendant is not at fault or that the Plaintiffs have failed to meet their burden of proof, then your verdict should be for the Defendant, you should sign Verdict Form C, and no further deliberation of the Jury is necessary.”).

949 Comparative Fault—Apportionment—Two Plaintiffs with One Claimed at Fault

To decide if [*plaintiff claimed to be at fault*] and [*no-fault plaintiff*] are entitled to recover damages from [*defendant*], and if so, the amount of those damages, apportion the fault of [*plaintiff claimed to be at fault*], [*defendant*], and [*identified nonpart(y)(ies)*] on a percentage basis. Do this as follows:

First, if [*defendant*] is not at fault, return your verdict for [*defendant*] and against [*name all plaintiffs*]; and deliberate no further. (Use Verdict Form 5009(A).)

If [*defendant*] is at fault, decide [*defendant*]'s percentage of fault, and the percentages of fault, if any, of [*plaintiff claimed to be at fault*] and [*identified nonpart(y)(ies)*] that caused [*plaintiffs*]' injuries. These percentages must total 100 percent. Do not apportion fault to any other person or entity.

If you decide that [*defendant*] was at fault, then:

- (1) Decide the total amount of [*no-fault plaintiff*]'s damages, if any. Do not consider fault when you decide this amount.
- (2) Multiply [*no-fault plaintiff*]'s total damages by [*defendant*]'s percentage of fault.
- (3) Return your verdict for [*no-fault plaintiff*] and against [*defendant*] in the amount of the product of that multiplication. (Use Verdict Form 5009(C2).)

Next, if [*plaintiff claimed to be at fault*]'s fault is greater than 50 percent, return a verdict for [*defendant*] and against [*plaintiff claimed to be at fault*] in this case, and deliberate no further as to [*plaintiff claimed to be at fault*]. (Use Verdict Form 5009(B).)

If you decide that [*plaintiff claimed to be at fault*]'s fault is 50 percent or less, then:

- (4) Decide the total amount of [*plaintiff claimed to be at fault*]'s damages, if any. Do not consider fault when you decide this amount.
- (5) Multiply [*plaintiff claimed to be at fault*]'s total damages by [*defendant*]'s percentage of fault.
- (6) Return your verdict for [*plaintiff claimed to be at fault*] and against [*defendant*] in the amount of the product of that multiplication. (Use Verdict Form 5009(C1).)

I will give you verdict forms that will help guide you through this process.

Comments

The committee strongly recommends use of Verdict Form No. 5009. The pattern instruction and verdict form have been drafted to complement each other.

Indiana Code § 34-51-2-7 discusses how to instruct the jury on comparative fault cases with a single defendant or multiple defendants treated as a single defendant. Although section 7 appears to require the jury to determine fault first before determining whether the defendant is negligent, cases have held to the contrary. If

the jury determines the defendant is not negligent in the first instance, or his conduct was not the proximate cause of the injuries, there is no need for the jury to allocate fault between the parties. *Koziol v. Vojvoda*, 662 N.E.2d 985, 992 (Ind. Ct. App. 1996). The jury should not be required to first allocate fault before finding the defendant not negligent; such an exercise is not only meaningless but is also a waste of effort by the jury. *Evans v. Schenk Cattle Co., Inc.*, 558 N.E.2d 892, 896 (Ind. Ct. App. 1990); see also *Utley v. Healy*, 663 N.E.2d 229, 233 (Ind. Ct. App. 1996) (no error to give this instruction: "[I]f you find the Defendant is not at fault or that the Plaintiffs have failed to meet their burden of proof, then your verdict should be for the Defendant, you should sign Verdict Form C, and no further deliberation of the Jury is necessary.").

951 Comparative Fault—Apportionment—Two Plaintiffs with One Claimed at Fault and Two Defendants Treated as One

To decide if [*plaintiff claimed to be at fault*] and [*no-fault plaintiff*] are entitled to recover damages from [*defendants*], and if so, the amount of those damages, apportion the fault of [*plaintiff claimed to be at fault*], [*defendants*], and [*identified nonpart(y)(ies)*] on a percentage basis. Do this as follows:

First, if [*defendants*] are not at fault, return your verdict for [*defendants*] and against [*name all plaintiffs*]; and deliberate no further. (*Use Verdict Form 5011(A).*)

If [*defendants*] are at fault, decide [*defendant*]'s percentage of fault, and the percentages of fault, if any, of [*plaintiff claimed to be at fault*] and [*identified nonpart(y)(ies)*] that caused [*plaintiffs*]' injuries. These percentages must total 100 percent. Do not apportion fault to any other person or entity.

If you decide that [*defendants*] were at fault, then:

- (1) Decide the total amount of [*no-fault plaintiff*]'s damages, if any. Do not consider fault when you decide this amount.
- (2) Multiply [*no-fault plaintiff*]'s total damages by [*defendant*]'s percentages of fault.
- (3) Return your verdict for [*no-fault plaintiff*] and against [*defendants*] in the amount of the product of that multiplication. (*Use Verdict Form 5011(C2).*)

Next, if [*plaintiff claimed to be at fault*]'s fault is greater than 50 percent, return your verdict for [*defendants*] and against [*plaintiff claimed to be at fault*] in this case; and deliberate no further. (*Use Verdict Form 5011(B).*)

If you decide that [*plaintiff claimed to be at fault*]'s fault is 50 percent or less, then:

- (4) Decide the total amount of [*plaintiff claimed to be at fault*]'s damages, if any. Do not consider fault when you decide this amount.
- (5) Multiply [*plaintiff claimed to be at fault*]'s total damages by [*defendant*]'s percentage of fault.
- (6) Return your verdict for [*plaintiff claimed to be at fault*] and against [*defendants*] in the amount of the product of that multiplication. (*Use Verdict Form 5011(C1).*)

I will give you verdict forms that will help guide you through this process.

Comments

The committee strongly recommends use of Verdict Form No. 5011. The pattern instruction and verdict form have been drafted to complement each other.

Indiana Code § 34-51-2-7 discusses how to instruct the jury on comparative fault cases with a single defendant or multiple defendants treated as a single defendant. Although section 7 appears to require the jury to determine fault first before determining whether the defendant is negligent, cases have held to the contrary. If

the jury determines the defendant is not negligent in the first instance, or his conduct was not the proximate cause of the injuries, there is no need for the jury to allocate fault between the parties. *Koziol v. Vojvoda*, 662 N.E.2d 985, 992 (Ind. Ct. App. 1996). The jury should not be required to first allocate fault before finding the defendant not negligent; such an exercise is not only meaningless but is also a waste of effort by the jury. *Evans v. Schenk Cattle Co., Inc.*, 558 N.E.2d 892, 896 (Ind. Ct. App. 1990); see also *Utley v. Healy*, 663 N.E.2d 229, 233 (Ind. Ct. App. 1996) (no error to give this instruction: "[I]f you find the Defendant is not at fault or that the Plaintiffs have failed to meet their burden of proof, then your verdict should be for the Defendant, you should sign Verdict Form C, and no further deliberation of the Jury is necessary.").

953 Respondeat Superior—Vicarious Liability

An employer is liable for the [negligent][wrongful] act of its employee done within the scope of [his][her] employment if the act is a responsible cause of the injury to the Plaintiff.

An employee's [negligent][wrongful] act is within the scope of employment when the employee's [negligent][wrongful] act occurred while the employee was performing activities expressly or impliedly authorized by the employer.

The [negligent][wrongful] act need not be intended to serve the employer, nor be authorized by the employer for it to fall within the scope of employment. The [negligent][wrongful] act must come from a course of conduct the employee performs while in the employer's service.

Comments

The determination of whether an employee is acting within the scope of his employment is dependent upon the circumstances of each case and is generally a question of fact for the jury. *Gomez v. Adams*, 462 N.E.2d 212, 223 (Ind. Ct. App. 1984); *Gibbs v. Miller*, 283 N.E.2d 592 (Ind. Ct. App. 1972).

Indiana does not require a plaintiff to prove that an employee's negligent or wrongful act was done with a purpose to serve the employer. Other jurisdictions do require a plaintiff to prove this purpose to serve the master/employer as an element. See *State v. Schallock*, 189 Ariz. 250, 258, 941 P.2d 1275, 1283 (1997); *Iandiorio v. Kriss & Senko Enterprises, Inc.*, 512 Pa. 392, 397–98, 517 A.2d 530, 533 (1986); *Sheldon v. Kettering Health Network*, 2015-Ohio-3268, ¶¶ 14–15, 40 N.E.3d 661, 668–69 (2d. Dist.).

The committee amended vicarious liability instructions in response to *Cox v. Evansville Police Dep't.*, 107 N.E.3d 453 (Ind. 2018):

To be clear, the focus in determining the scope of employment “must be on how the employment relates to the context in which the commission of the wrongful act arose.” *Barnett*, 889 N.E.2d at 285 (quoting *Stropes*, 547 N.E.2d at 249). When tortious acts are so closely associated with the employment that they arise naturally or predictably from the activities an employee was hired or authorized to do, they are within the scope of employment, making the employer liable. *West*, 81 N.E.3d at 1072–73. But tortious acts are not within the scope of employment when they flow from a course of conduct that is independent of activities that serve the employer. *Barnett*, 889 N.E.2d at 283–84.

Cox, 107 N.E.3d at 461.

The court in *Cox* also recognized the special case of a police officer misusing employer conferred power and authority in finding a city liable if the conduct arose naturally or predictably from the officer's employment activities. The reasoning of the court was as follows:

The reason underlying scope-of-employment liability support this conclusion. First, the city benefits from the lawful exercise of police power, so when tortious abuse of that power naturally or predictably flows from employment

activities, the city equitably bears the cost of the victim's loss. *See West*, 81 N.E.3d at 1072–73. And second, holding the city liable encourages it to guard against recurrent assaults. Particularly because cities vest considerable power and authority in police officers, we want cities to exercise vigilance in hiring and supervising officers. *See Waymire*, 114 F.3d at 649.

So the scope-of-employment rule, shaped by its underlying policies, allows employer liability for an officer's sexual assault. We stress that the unique authority that cities vest in police officers drives this conclusion.

Cox, 107 N.E.3d at 463. Additionally, in *Burton v. Benner*, 140 N.E.3d 848 (Ind. 2020), the Indiana Supreme Court held that there was no genuine issue of material fact as to whether a police officer was acting **clearly outside** the scope of his employment when he was operating his police vehicle at the time he was involved in an auto accident. The officer's conduct was the same general nature was authorized by police policy; he was maintaining radio contact, conforming to the dress code and could suddenly be available for official duties. *Id.* at 853.

The following instruction was affirmed in *Walgreen Co. v. Hinchy*, 21 N.E.3d 99 (Ind. Ct. App. 2014):

An employer is liable for the wrongful acts of its employee which are committed within the scope of employment.

An act is within the scope of employment if it is incidental to the employee's job duties, that is to say, the employee's wrongful act originated in activities closely associated with her job.

In deciding whether an employee's wrongful act was incidental to her job duties or originated in activities closely associated with her job, you may consider:

1. Whether the wrongful act was of the same general nature as her authorized job duties;
2. Whether the wrongful act is intermingled with authorized job duties; and
3. Whether the employment provided the opportunity or the means by which to commit the wrongful act.

Id. at 110–111. The definition of “incidental” included in the instruction was derived from *Celebration Fireworks*, 727 N.E.2d at 453; *Wilson v. Isaacs*, 917 N.E.2d 1251 (Ind. Ct. App. 2009), *vacated in part* by 929 N.E.2d 200 (Ind. 2010); *Ellis v. City of Martinsville*, 940 N.E.2d 1197 (Ind. Ct. App. 2011); *Smith v. Ind. Dep't of Corr.*, 871 N.E.2d 975, 986 (Ind. Ct. App. 2007). *Walgreen Co.*, 21 N.E.3d at 110–11. Other cases have included a factor that considers whether the act was done to further the employer's business. *Bushong v. Williamson*, 790 N.E.2d 467, 473 (Ind. 2003). However, the approved instruction did not include whether the act was “to further his employer's business.”

For instructions concerning agency and related issues, *see* Series 3500.

954 Respondeat Superior—Constructive Knowledge of Employer

Knowledge of [defendant]'s agent or employee acquired within the scope employment is knowledge of [defendant], regardless of whether the agent or employee shared [his][her] knowledge with anyone else.

Comments

Southport Little League v. Vaughan, 734 N.E.2d 261, 275 (Ind. Ct. App. 2000):

This court has long recognized that a principal is charged with the knowledge of that which his agent by ordinary care could have known where the agent has received sufficient information to awaken inquiry. *Travelers Ins. Co. v. Eviston*, 110 Ind. App. 143, 37 N.E.2d 310, 316 (1941). We have previously held that knowledge of material facts acquired by an agent in the course of his employment, and within the scope of his authority, is the knowledge of the principal, and where no actual knowledge of the principal is shown, the rule will be given the effect on the theory of constructive knowledge, resting on the legal principle that it is the duty of the agent to disclose to his principal all material facts coming to his knowledge, and upon the presumption that he has discharged that duty. *National Mut. Ins. Co. of Celina, Ohio v. Bales*, 81 Ind. App. 302, 139 N.E. 703 (1923). The Indiana Supreme Court has stated that:

Notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and, if he has not, still, the principal having entrusted the agent with the particular business, the other party has the right to deem his acts and knowledge obligatory upon the principal. *Field v. Campbell*, 164 Ind. 389, 72 N.E. 260, 263 (1904)

955 Negligence of Party Providing Dangerous Item for Use by Another

If you find that:

- (1) [*defendant*], either directly or through a third person, provided an item for use by another person;
- (2) [*defendant*]:
 - (a) knew or had reason to know that the item was dangerous or was likely to be dangerous for the use for which it was provided; and
 - (b) had no reason to believe that the other person would realize the dangerous condition;
- (3) [*defendant*] did not use reasonable care to inform a person likely to use the item of the dangerous condition or of the facts that made it likely to be dangerous;
- (4) [*plaintiff*] was someone who [*defendant*] expected or should have expected:
 - (a) would be allowed to use the item, or
 - (b) would be endangered by the item's probable use;
- (5) a person whom [*defendant*] expected to use the item, did use it;
- (6) the item was used in the way [*defendant*] expected; and
- (7) the item's use caused physical harm to [*plaintiff*],

then you may consider this as fault to be assessed against [*defendant*].

Comments

This instruction is a general instruction that applies to persons who in any way or for any purpose supply chattels for the use of others or permit others to use their chattels. Instruction No. 957 is a general instruction that applies to persons who supply chattels for the use of others for a business purpose of the supplier. Breach of the indicated duties is evidence of negligence to be weighed against the negligence, if any, of the plaintiff. The Restatement of Torts, 2d should be consulted for additional rules upon the suppliers of chattels because of other purposes for which or the manner in which the chattels are supplied or because the chattel has been made by them or put out as their product.

957 Negligence of Party Providing Dangerous Item for a Business Purpose of the Provider

If you find that:

- (1) [defendant], either directly or through a third person, provided an item to another person for [defendant]'s business purposes;
- (2) [defendant] either knew or should have discovered that the item had a dangerous condition or character;
- (3) [defendant] failed to:
 - (a) use reasonable care to make the item safe for the use for which it was provided; or
 - (b) inform the expected users of the item of its dangerous condition or character;
- (4) [plaintiff] was someone:
 - (a) for whose use [defendant] provided the item, or
 - (b) who [defendant] expected or should have expected would be endangered by the item's probable use;
- (5) the item was used by the person to whom it was provided;
- (6) the item was used in the way [defendant] expected; and
- (7) the item's use caused physical harm to [plaintiff],

then you may consider this as fault to be assessed against [defendant].

Comments

While Instruction No. 955 is a general instruction that applies to persons who in any way or for any purpose supply chattels for the use of others or permit others to use their chattels, this instruction is a general instruction that applies to persons who supply chattels for the use of others for a business purpose of the supplier. Breach of the indicated duties is evidence of negligence to be weighed against the negligence, if any, of the plaintiff. The Restatement of Torts, 2d should be consulted for additional rules upon the suppliers of chattels because of other purposes for which or the manner in which the chattels are supplied or because the chattel has been made by them or put out as their product.

959 Dram Shop—Issues for Trial; Burden of Proof

The Plaintiff, _____, sued _____, the Defendant.

[Plaintiff] claims that [defendant] furnished an alcoholic beverage to [name the person] when:

- (1) [defendant] knew that [name of person] was visibly intoxicated when [defendant] furnished the alcoholic beverage, and
- (2) [name the person]’s intoxication was a responsible cause of [plaintiff]’s [death][injury][damage].

[Plaintiff] must prove [his][her][its] claims by the greater weight of the evidence.

[Defendant] denies [plaintiff]’s claim. [Defendant] is not required to disprove [plaintiff]’s claims.

[Defendant] has claimed certain defenses. [Defendant] must prove [his][her][its] defense[s] of [specify affirmative defense(s)] by the greater weight of the evidence.

[(Plaintiff) also claims (he)(she) is entitled to an award of punitive damages because (insert brief statement of claim for punitive damages). (Plaintiff) must prove this claim by clear and convincing evidence.]

Comments

Marlow v. Better Bars, Inc., 45 N.E.3d 1266 (Ind. Ct. App. 2015) (discussing Indiana’s Dram Shop Act and issues related to actual knowledge of visible intoxication and proximate cause).

Indiana Code § 7.1-5-10-15.5. Indiana Code § 7.1-1-3-4 defines “alcohol.” Indiana Code § 9-13-2-86 defines “intoxicated.”

“Furnish” includes barter, deliver, sell, exchange, provide, or give away. Indiana Code § 7.1-5-10-15.5(a).

961 **Sporting Event Injuries—Co-Participants, Spectators, and/or Third Persons**

A participant in [sport] must not intentionally or recklessly cause injury.

[Defendant]’s conduct is intentional if:

- (1) [Defendant] either intends to cause injury or believes injury is substantially certain to occur; and,
- (2) the intent to injure falls outside the range of ordinary activity in [sport] generally.

[Defendant]’s conduct is reckless if:

- (1) [Defendant] intentionally acts or intentionally fails to act;
- (2) [Defendant] is consciously indifferent to [plaintiff]’s safety; and,
- (3) [Defendant]’s conduct, including [his][her] state of mind, falls outside the range of ordinary activity in [sport] generally.

In determining intentional or reckless conduct, you may consider:

- (1) the nature of [sport];
- (2) the customs and practices of [sport][at the level being played][including the types of contact and the level of violence generally accepted]; and
- (3) the rules governing [sport].

Comments

This instruction only applies to injuries caused by a sports participant to another sports participant or spectator.

In *Pfenning v. Lineman*, the Indiana Supreme Court held that “in negligence claims against a participant in a sports activity, if the conduct of such participant is within the range of ordinary behavior of participants in the sport, the conduct is reasonable as a matter of law and does not constitute a breach of duty.” 947 N.E.2d 392, 404 (Ind. 2011) (golfer’s errant drive that resulted in plaintiff’s injury was “clearly within the range of ordinary behavior of golfers and thus is reasonable as a matter of law and does not establish the element of breach required for a negligence action”). After *Pfenning*, the analysis of an injury at a sports event is not based on the status of the *plaintiff* or her incurrence of risk, but on whether the conduct of the *defendant* is within the range of ordinary behavior of participants in the sport. If it is, the conduct is reasonable as a matter of law and there is no breach of duty.

The degree of physical contact allowed varies from sport to sport and even from one group of players to another. In *Allen v. Dover Co-Recreational Softball League*, 807 A.2d 1274, 1284 (N.H. 2002), cited in *Pfenning*, the New Hampshire Supreme Court noted “[r]isks that are outside the range of the ordinary activity involved in the sport” do not “reasonably flow from participation in the sport.” Therefore, to determine the appropriate standard of care to be applied to participants, sponsors and organizers of recreational athletics, it considered: (1) the nature of the sport

involved; (2) the type of contest, *i.e.*, amateur, high school, little league, pick-up, etc.; (3) the ages, physical characteristics, and skills of the participants; (4) the type of equipment involved; and (5) the rules, customs, and practices of the sport, including the types of contact and the level of violence generally accepted. *Allen*, 807 A.2d at 1285. The Indiana Court of Appeals has held that recognized rules of a sport are an indication of the standard of care players owe each other; while a violation of those rules may not be negligence *per se*, it may well be evidence of negligence. *Duke's GMC, Inc. v. Erskine*, 447 N.E.2d 1118, 1124 (Ind. Ct. App. 1983).

The *Pfenning* Court noted that strong public policy considerations favor the encouragement of participation in athletic activities and the discouragement of excessive litigation of claims by persons who suffer injuries from participants' conduct. These policy reasons support "affording enhanced protection against liability to co-participants in sports events." 947 N.E.2d at 403.

In *Pfenning* the Indiana supreme court dealt with the unfortunate circumstance of a teenage granddaughter invited to participate in a golfing tournament by her grandfather, as the driver of a beverage golf cart was struck in the mouth and jaw by a drive of one of the sports participants. The granddaughter sued (1) the golfer who hit the ball, (2) the Elks Club who owned the golf course (3) the tavern that sponsored the golf tournament, and (4) her grandfather who told her to drive a cart without a front windshield or roof. The Indiana Supreme Court established a new limited liability rule that in Indiana courts should not referee disputes when arising from ordinary sports activity. In *Pfenning*, the court held that when a sports participant injures someone while in engaging in conduct ordinary in the sport and without intent to injure or recklessness, the participant does not breach a duty. Judgment was granted by the trial court and affirmed by the Court of Appeals which found that the motion was properly granted in favor of the golfer and the Elks Club who owned the golf course. The ruling was reversed as to the tavern that sponsored the golf tournament. The Supreme Court said "our replacement formulation (finding no breach by an athlete engaged in this sports' ordinary activities) applies to conduct of sports participants, not promoters of sporting events (the tavern) and thus does not insulate Whitey's from potential liability." Because the grandfather was presumably working as an agent of the tavern when he provided his granddaughter with a windowless and roofless beverage cart which would allow a golf ball to strike her in the face, there was no summary judgment appropriate for the tavern. As to her grandfather, who was neither a participant nor owner of the real estate where the sport occurred, but rather was a grandfather providing a granddaughter a windowless and roofless beverage golf cart which created a genuine issue of material fact precluding summary judgment for the grandfather who had a duty to protect his granddaughter from risks.

In *Megenity v. Dunn*, 68 N.E.3d 1080 (Ind. 2017), the Indiana Supreme Court addressed a sports case where two participants in a karate demonstration where involved in an injury, when a karate class member jump-kicked instead of doing a less explosive kick and injured another player. The main holding of *Megenity* is that when you look to determine whether its ordinary behavior, you look at the sport generally not the specific activity within the sport. Because a jump-kick was ordinary activity when looking at the sport generally there was no duty or breach

of duty. However, the *Megenity* court repeated the holding of the court in *Pfenning*, see footnote 3 of *Pfenning*, 947 N.E.2d, page 404. That is, there still can be liability for which summary judgment should not apply if there are genuine issues of material fact presented by designated evidence of intentional or reckless infliction of injury. The *Megenity* court set out the elements to show intentional infliction of sports injury: (1) that the defendants sports participant must either desire to cause the consequences of his act or believe those consequences are substantially certain to result in second and until that intent to injure must fall “totally outside the range of ordinary activity involved in this sport” overall.

If a premises liability claim is allowed to go to the jury, refer to *Hoosier Mt. Bike Ass’n v. Kaler*, 73 N.E.3d 712 (Ind. Ct. App. 2017) which is a case that deals with premises liability claims while participating in sports activities. See the note in the comments to instruction 1932b, 1921 and 1915.

CHAPTER 1100

COMMON LAW NEGLIGENCE—CLAIMS AGAINST GOVERNMENT

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1101 Issues for Trial; Burden of Proof

The Plaintiff, _____, sued _____, the Defendant.

[*Plaintiff*] claims that [*defendant*][*insert claimed action(s)*]. [*Plaintiff*] must prove [his][her][its] claims by the greater weight of the evidence.

[*Defendant*] denies [*plaintiff*]'s claims. [*Defendant*] is not required to disprove [*plaintiff*]'s claims.

[*Defendant*] has claimed certain defenses. [*Defendant*] must prove [his][her][its] defense[s] of [*specify affirmative defense(s)*] by the greater weight of the evidence.

[(*Plaintiff*)] also claims (he)(she)(it) is entitled to an award of punitive damages because (*insert brief statement of claim for punitive damages*). (*Plaintiff*) must prove this claim by clear and convincing evidence.]

Comments

This instruction should be modified to set forth all claims, counterclaims, and cross claims.

Jury Rule 20 and Trial Rule 51(A) require that the trial court give preliminary instructions as to the issues for trial and the burden of proof. The trial court and counsel should carefully prepare a preliminary instruction setting out the issues for trial in narrative form, including all claims, counterclaims, and cross claims. The instruction should be brief, accurate, conversational, and as non-technical as possible.

If a pretrial order has been entered, *see* T.R. 16(J), the Committee recommends that the instruction be drafted based on that order, which supplants the allegations in the pleadings, but should not be rigidly or pointlessly applied. *See Vlach v. Goode*, 515 N.E.2d 569 (Ind. Ct. App. 1987); 62 Am. Jur. 2d PreTrial Conference § 29 at 661 (1972).

Whether a pretrial order has been entered or not, the Committee recommends against reading the pleadings to the jury.

If a judge gives this Instruction as a final instruction, he or she should also give Instruction No. 1103, or otherwise ensure that the jury is instructed on the elements of a negligence claim.

1103 Elements; Burden of Proof

[Plaintiff] claims [defendant] was [negligent][*designate other type of fault*].

To recover on this claim, [plaintiff] must prove by the greater weight of the evidence that:

1. [defendant] acted or failed to act [by][in one or more of the following ways]:
[insert how plaintiff claims that defendant was negligent or otherwise at fault];
and
2. [defendant]'s act or failure to act was [negligent][*designate other type of fault*];
and
3. [defendant]'s act or failure to act was a responsible cause of [plaintiff]'s
claimed injuries; and
4. [plaintiff] suffered damages as a result of the injuries.

To recover an award of punitive damages, [plaintiff] must prove by clear and convincing evidence that:

[Here set out the elements of plaintiff's claim for punitive damages to correspond to the factual disputes raised by the evidence.]

[Defendant] denies [plaintiff]'s claims. [Defendant] is not required to disprove [plaintiff]'s claims.

A defendant may defend [himself][herself] by claiming certain specific "defenses." In this case [defendant] claims: *[Here set out the elements of defendant's affirmative defenses to correspond to the factual disputes raised by the evidence.]* To prove these defenses, [defendant] must prove by the greater weight of the evidence that:

[Here set out the elements of defendant's affirmative defenses to correspond to the factual disputes raised by the evidence.]

Comments

In *Laporte Cmty. Sch. Corp. v. Rosales*, 963 N.E.2d 520, 524 (Ind. 2012), the Indiana Supreme Court criticized an instruction based on Civil Pattern Instruction No. 9.03, stating:

While Instruction 22 may have been intended to explain to the jury that the plaintiff had the burden of proving the elements of negligence, proximate cause, and damages, the language and phrasing of the instruction permitted the jury to infer that the factual allegations set forth in subparts A-E should be understood as factual circumstances identified by the court, based on the facts of the case, that automatically constitute negligence if proven by a preponderance of the evidence.

But see Hill v. Rhinehart, 45 N.E.3d 427 (Ind. Ct. App. 2015), distinguishing *Rosales* and determining that the jury instruction given in a medical malpractice case was proper because it "did not include any confusing factual recitations, but rather amounted to a straight forward statement which focused on the proper

standard of care for finding medical negligence.”

The Committee has therefore revised this instruction to set forth the elements of negligence.

In element 1, the judge should use “by” if the plaintiff claims the defendant was negligent in one way, and should use “in one or more of the following ways” if the plaintiff claims the defendant was negligent in more than one way. If the plaintiff claims the defendant was negligent in more than one way, and the instruction lists each of the ways in which the defendant was negligent, the judge should be careful to separate those allegations with the word “or” rather than “and” to avoid mistakenly telling the jury that all allegations of negligence must be proven.

The judge can decide how specific to make the description of how plaintiff claims that the defendant was negligent, from a general description of the claim (“in the way he operated a motor vehicle”) to a specific list of all of plaintiff’s allegations (“in one of the following ways: (1) running the red light, or (2) exceeding the speed limit”).

A judge should further modify (or add to) this Instruction if the case involves a type of fault other than (or in addition to) negligence, such as gross negligence. The punitive damages elements are found in Instruction Nos. 737 to 745.

This instruction should be modified to reflect the factual situation of each case. If this instruction is given at the close of the evidence, it should set out allegations in the pleadings that are supported by the evidence; allegations with no supporting evidence should be omitted from the instruction.

The Committee has included both this instruction and the previous instruction in this chapter so that a judge can give either one (or both), based on his or her preference.

1105 Contributory Negligence—Definition; Burden of Proof

[Defendant] claims [plaintiff]'s own negligence contributed to the [injury][harm][plaintiff] claims to have suffered and that [plaintiff]'s negligence was a responsible cause of the [injury][harm]. Negligence of this kind is "contributory negligence."

[Defendant] has the burden of proving by the greater weight of the evidence that [plaintiff] was contributorily negligent.

If you decide that [plaintiff]'s contributory negligence was a responsible cause of [his][her][injury][harm], then [plaintiff] cannot recover damages even if [defendant] was also negligent.

Comments

Contributory negligence is a plaintiff's conduct that legally contributes to plaintiff's harm and that falls below the standard of care. *Smith v. Hull*, 659 N.E.2d 185 (Ind. Ct. App. 1995); *Havert v. Caldwell*, 452 N.E.2d 154 (Ind. 1983); *Holtam v. Sachs*, 136 Ind. App. 231, 193 N.E.2d 370 (1963); *Huey v. Milligan*, 242 Ind. 93, 175 N.E.2d 698 (1961); Restatement 2d Torts § 463. To prove contributory negligence, the defendant must show that the plaintiff's negligent act was a proximate cause of plaintiff's injury and that plaintiff was actually aware of or should have appreciated the risks involved. *Memorial Hospital of South Bend, Inc. v. Scott*, 261 Ind. 27, 300 N.E.2d 50 (1973).

Contributory negligence is not a defense to an action for willful injury. *Hoesel v. Cain*, 222 Ind. 330, 53 N.E.2d 165 (1943).

1107 Negligence—Definition

Negligence is the failure to use reasonable care.

A person may be negligent by acting or by failing to act. A person is negligent if he or she does something a reasonably careful person would not do in the same situation, or fails to do something a reasonably careful person would do in the same situation.

Comments

Negligence consists of the failure to use reasonable care, due care, or ordinary care, which is measured by the care a person of reasonable prudence would ordinarily exercise under like conditions and circumstances. *Central Transport, Inc. v. Great Dane Trailers, Inc.*, 423 N.E.2d 675 (Ind. Ct. App. 1981); *Southern Ry. Co. v. Harpe*, 223 Ind. 124, 58 N.E.2d 346 (1944); *Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 38 N.E.2d 257 (1941); *Cleveland, C., C. & S. L. Ry. Co. v. Jones*, 51 Ind. App. 245, 99 N.E. 503 (1912).

Negligence is comprised of three elements: (1) a duty on the part of the defendant to conform his conduct to the standard of care necessitated by the relationship; (2) a breach of that duty; and (3) injury that the plaintiff suffered as a result of that failure. *Benton v. Oakland City*, 721 N.E.2d 224 (Ind. 1999); *Dibortolo v. Metropolitan School Dist.*, 440 N.E.2d 506 (Ind. Ct. App. 1982).

When found to exist, the duty to exercise reasonable care under the circumstances never changes; however, the standard of conduct required to measure up to that duty varies depending upon the particular circumstances. *Franklin v. Benock*, 722 N.E.2d 874 (Ind. Ct. App. 2000). *Clyde E. Williams & Assoc. v. Boatman*, 375 N.E.2d 1138, 1141 (Ind. Ct. App. 1978), discusses the issue of duty in the context of jury instructions:

While it is clear that the trial court must determine if an existing relationship gives rise to a duty, it must also be noted that a factual question may be interwoven with the determination of the existence of a relationship, thus making the ultimate existence of a duty a mixed question of law and fact. This dichotomy presents a trial court with a difficult problem in the drafting of instructions.

In *Clyde E. Williams & Assoc.*, the jury was instructed to consider whether the defendant had a duty, but was not given any direction about how to make that determination. The Court of Appeals stated that “it would be proper to instruct the jury alternatively that if it should find a certain set of facts, then a duty exists; however, should the jury reach a different factual conclusion, then no duty would exist.” *Clyde E. Williams & Assoc.*, 375 N.E.2d at 1141. This duty question may arise, for example, in the context of premises liability where certain duties apply based on the status of the person on the property. *Clyde E. Williams & Assoc.*, 375 N.E.2d at 1141.

1109 Reasonable Care—Definition

Reasonable care means being careful and using good judgment and common sense.

Comments

Negligence consists of the failure to use reasonable care, due care, or ordinary care, which is measured by the care a person of reasonable prudence would ordinarily exercise under like conditions and circumstances. *Central Transport, Inc. v. Great Dane Trailers, Inc.*, 423 N.E.2d 675 (Ind. Ct. App. 1981); *Southern Ry. v. Harpe*, 223 Ind. 124, 58 N.E.2d 346 (1944); *Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 38 N.E.2d 257 (1941); *Cleveland, C., C. & St. L. Ry. v. Jones*, 51 Ind. App. 245, 99 N.E. 503 (1912).

When found to exist, the duty to exercise reasonable care under the circumstances never changes; however, the standard of conduct required to measure up to that duty varies depending upon the particular circumstances. *Franklin v. Benock*, 722 N.E.2d 874 (Ind. Ct. App. 2000).

In Indiana there are no degrees of care. The use of such terms as slight care, great care, highest degree of care, or other like expressions in instructions as indicating the quantum of care the law exacts under special conditions and circumstances is misleading. *Thompson v. Ashba*, 122 Ind. App. 58, 102 N.E.2d 519 (1951); *Midwest Motor Coach Co. v. Elliott*, 95 Ind. App. 64, 182 N.E. 541 (1932).

A person with a mental disability is generally held to the same standard of care as that of a reasonable person under the same circumstances without regard to the person's capacity to control or understand the consequences of his or her actions. See Restatement 2d Torts § 283B (1965); *Creasy v. Rusk*, 730 N.E.2d 659, 667 (Ind. 2000). In *Creasy*, the Supreme Court balanced three factors to determine whether an individual owes a duty to another (the relationship between the parties, whether the harm to the person injured was reasonable foreseeable, and public policy concerns) and held that an Alzheimer patient owed no duty of care to a nursing home assistant who was injured when the patient kicked her.

For the standard of care of children, see Instruction No. 1129 on contributory negligence of children and Instruction No. 927 on comparative fault of children.

For the standard of care in an excessive force claim, see Instruction No. 1211.

For the instruction on sporting event injuries, see Instruction No. 961.

1111 Willful or Wanton Misconduct—Definition

“Wanton or willful” misconduct is an intentional [act][failure to act] done with reckless disregard of probable injury to a person, when the defendant knew of that probability [and, if the defendant failed to act, (he)(she) had the opportunity to avoid the risk].

Comments

Wanton and willful misconduct consists of either: (1) an intentional act done with reckless disregard of the natural and probable consequence of injury to a known person under circumstances known to the actor at the time; or (2) an omission or failure to act done with actual knowledge of the natural and probable consequence of injury and the opportunity to avoid that risk. *Witham v. Norfolk & W. R. Co.*, 561 N.E.2d 484, 486 (Ind. 1990); *Nesvig v. Town of Porter*, 668 N.E.2d 1276, 1283 (Ind. Ct. App. 1996).

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1113 Contributory Negligence—Not a Defense to Willful and Wanton Misconduct

If [plaintiff] proves that [defendant]’s conduct was willful and wanton misconduct, [defendant] may not defend himself by claiming that [plaintiff] has been contributorily negligent.

[However, if both (plaintiff)’s and (defendant)’s conduct was willful and wanton misconduct, (defendant) may defend himself by claiming that (plaintiff) contributed to the (injury)(harm).]

Comments

This instruction may be appropriate for actions against governmental entities or public employees (Ind. Code ch. 34-13-3), actions against health care providers (Ind. Code art. 34-18), or traditional guest statute (Ind. Code ch. 34-30-11) cases if the guest statute case was filed before the effective date of Indiana’s Comparative Fault Act (1985). This instruction is not applicable, however, to cases tried under the Comparative Fault Act (Ind. Code ch. 34-51-2).

Indiana case law interpreting Indiana’s guest statutes, which applies to close family members and hitchhikers, indicates that a plaintiff must prove that the conduct of the defendant (the owner or operator of the motor vehicle) was either willful or wanton and was the proximate cause of the plaintiff’s injuries in order to recover; more than mere negligence or carelessness is required. *Coplen v. Omni Restaurants*, 636 N.E.2d 1285 (Ind. Ct. App. 1994); *Andis v. Newlin*, 442 N.E.2d 1106 (Ind. 1982); *Thrapp v. Austin*, 436 N.E.2d 1170 (Ind. Ct. App. 1982). Indiana case law has traditionally prevented a defendant in a Guest Statute case from asserting the contributory negligence of the plaintiff as a defense because contributory negligence is no defense to an action for a willful injury. *Hoepfner v. Saltzgeber*, 102 Ind. App. 458, 200 N.E. 458 (1936); *Pierce v. Clemens*, 113 Ind. App. 65, 46 N.E.2d 836 (1943); *Hoesel v. Cain*, 222 Ind. 330, 53 N.E.2d 165 (1943); *Antcliff v. Datzman*, 436 N.E.2d 114 (Ind. Ct. App. 1982).

On the other hand, if both parties were wanton and willful, plaintiff’s wanton and willful misconduct *can* be a complete defense. *Pierce*, 46 N.E.2d at 841.

“[G]enerally, as against third persons, other than the driver of the vehicle in which he is riding, a guest or occupant is required to use the degree of care for his own safety that ordinarily prudent persons in like circumstances would use under the same or similar circumstances, and the failure to use such care may constitute contributory negligence barring recovery from third persons.” I.L.E. Automobiles 261; *Lindley v. Sink*, 218 Ind. 1, 30 N.E.2d 456 (1940); *Keeshin Motor Express Co. v. Glassman*, 219 Ind. 538, 38 N.E.2d 847 (1942).

In the context of comparative fault, contributory negligence may reduce or bar plaintiff’s recovery even if the defendant is proven to have acted recklessly or willfully and wantonly, *Robbins v. McCarthy*, 581 N.E.2d 929 (Ind. Ct. App. 1991), or grossly negligently, *Northern Ind. Pub. Serv. Co. v. Sharp*, 790 N.E.2d 462 (Ind. 2003).

1115 Reckless—Definition

A person acts recklessly when [he][she] disregards a substantial risk of danger that either is known or would be apparent to a reasonable person in the same position. The conduct must be a significant departure from reasonable care.

Comments

If driving while intoxicated is willful and wanton per se, it is also reckless per se. *Obremski v. Henderson*, 487 N.E.2d 827, 830 (Ind. Ct. App. 1986). In *Obremski*, proof of the driver's intoxication at the time of a car crash allowed the trier of fact in a civil action to infer the driver was acting "recklessly" within the meaning of Ind. Code § 35-41-2-2(c) to permit recovery of treble damages and attorney fees for damages caused by criminal mischief. *Criticized by Wohlwend v. Edwards*, 796 N.E.2d 781 (operating while intoxicated alone does not constitute willful and wanton misconduct; some other misconduct, such as crossing the center line and striking another car, must exist to constitute willful and wanton misconduct).

Voluntary co-participants in sports activities assume the inherent and foreseeable dangers of the activity and cannot recover for injury unless it can be established that the other participant either intentionally caused the injury or engaged in conduct so reckless as to be totally outside the range of ordinary activity involved in the sport. *Mark v. Moser*, 746 N.E.2d 410, 420 (Ind. Ct. App. 2001), *disapproved on other grounds by Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011). Recklessness differs from intentional wrongdoing in that, while the act must be intended by the actor in order to be considered reckless, the actor does not intend the harm that results from the act. *Mark*, 746 N.E.2d at 422, *disapproved on other grounds by Pfenning*, 947 N.E.2d 392. Recklessness differs from intentional wrongdoing in that while the act must be intended by the actor in order to be considered reckless, the actor does not intend the harm that results from the act. *Mark*, 746 N.E.2d at 422.

For the instruction on sporting event injuries, see Instruction No. 961.

1117 Responsible Cause (Proximate Cause)—Definition

A person's conduct is legally responsible for causing [an injury][property damage][a death] if:

- (1) the [injury][property damage][a death] would not have occurred without the conduct, and
- (2) the [injury][property damage][a death] was a natural, probable, and foreseeable result of the conduct.

This is called a "responsible cause."

[There can be more than one responsible cause for an injury.]

Comments

Scholars identify the use of legal jargon and arcane legalese as the most serious flaws of contemporary jury instructions. John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1209 (2002). In fact, in one study of 14 jury instructions, the proximate cause instruction produced proportionally the most misunderstanding among laypersons. The study revealed that jurors mistake "proximate cause" for "approximate cause," "estimated cause," or some fabrication. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979); see also Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L.J. 456, 468 (1962) ("proximate cause" is frequently misinterpreted to mean "probable" or "approximate cause"); James D. Wascher, *The Importance of Juries: The Long March Toward Plain English Jury Instructions*, 19 Chicago Bar Ass'n Record 50, 50–51 (2005) (a Chicago judge reported that he presided over a trial in which the jury sent him a note asking whether proximate cause meant "it's pretty close to the cause").

Prosser and Keeton say that proximate cause is "is an unfortunate word, which places entirely the wrong emphasis on the factor of physical or mechanical closeness." Prosser & Keeton, *The Law of Torts* § 42. They even imply that it was a sin to have coined the term "proximate cause" in the first place. *Id.* ("The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins.") The Committee has determined that use of a term so likely to be misunderstood is against the policy behind clear jury instructions.

There are two types of causation in a negligence case—causation in fact and proximate cause. See, e.g., Prosser & Keeton, *The Law of Torts* §§ 41 (causation in fact), 42 (proximate cause) (5th ed. 1984). Causation in fact is the threshold question of whether "but for" the defendant's negligent conduct, plaintiff's harm would not have occurred. Or, to put it another way, plaintiff's harm would not have occurred without the defendant's negligent conduct. *Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981) (citing W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971); 21 I.L.E. Negligence § 62 (1959)). Because the consequences of an act go forward to eternity and back before the dawn of human events, there must also be "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." Prosser &

Keeton, *The Law of Torts* § 41. This is proximate cause, and it boils down to “whether the conduct has been so significant and important a cause that the defendant should be legally responsible.” Prosser & Keeton, *The Law of Torts* § 41. Prosser and Keeton therefore suggest that either “responsible cause” or “legal cause” would be a more appropriate term. Prosser & Keeton, *The Law of Torts* § 41. Because use of the term “legal cause” might suggest to the jury that there could also be an “illegal cause,” the Committee selected “responsible cause.”

The Indiana Supreme Court has held that a proximate cause instruction is not *required* to refer to “but for” causation, “so long as the instructions as a whole adequately convey the law in this area.” *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 301 (Ind. 2009). To ensure that the instructions as a whole *do* adequately convey both proximate cause and causation in fact, the Committee has included both concepts in this one instruction. Subpart (1) of the instruction (“the injury would not have occurred without the conduct”) instructs on causation in fact. And because the Indiana Supreme Court has explained proximate cause as the natural and probable consequence of the conduct, subpart (2) of the instruction (“the injury was a natural and probable result of the conduct”) instructs on proximate cause. “A negligent act is said to be the proximate cause of an injury ‘if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.’ ” *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003) (quoting *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000)).

Plaintiff in a negligence action has the burden of proving causation in fact by a preponderance of the evidence. *Turner v. Davis*, 699 N.E.2d 1217 (Ind. Ct. App. 1998) (causation in fact); *Carter v. Aetna Life Ins. Co.*, 217 Ind. 282, 27 N.E.2d 75 (1940) (proximate cause). What is the proximate cause of the injury is ordinarily a question of fact for the jury that becomes a question of law when only a single conclusion can be drawn from the facts. *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101 (Ind. Ct. App. 1999).

The court is not required to repeat the substance of an instruction defining proximate cause, and outlining the necessity of establishing it, in every general instruction relating to the subject of negligence. *Swallow Coach Lines, Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938).

The “conduct” discussed in this Instruction includes acts and omissions. *See, e.g.*, Instruction Nos. 909 and 1107.

There can be more than one responsible cause for an injury. *See, e.g.*, *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006) (“An injury may have more than one proximate cause.”); *Board of Comm’rs v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992) (“There may be more than one proximate cause of an event.”); *Krohn v. Shidler*, 140 Ind. App. 175, 185 (1966) (“It is not necessary that such negligence be the sole proximate cause.”). The bracketed sentence about multiple responsible causes should be given when it is an issue in the case.

1118 Foreseeable—Defined

[An injury][Property damage][A death] is “foreseeable” when a person should realize that [his][her] act or failure to act might cause harm.

Comments

In the context of proximate/responsible cause, the question is whether the injury “is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.” *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 108 (Ind. 2002) (citing *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000)). “The determination of what is reasonably foreseeable is not judged by the subjective opinions of those involved, but is based upon the standard of due care in avoiding a result which might reasonably have been anticipated in the ordinary experience of people.” *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 917–18 (Ind. Ct. App. 2001) (citing *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101, 1105 (Ind. Ct. App. 1999)). When some harm is foreseeable, a person is responsible for any injury even if the extent of the injury was unforeseeable. *Bolin v. Wingert*, 764 N.E.2d 201, 207–08 (Ind. 2002). “If the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor’s negligence.” *Hampton v. Moistner*, 654 N.E.2d 1191, 1194 (Ind. Ct. App. 1995).

1119 Intervention of Outside Cause

Sometimes an unrelated event breaks the connection between a defendant's negligent action and the injury a plaintiff claims to have suffered. If this event was not reasonably foreseeable, we call the event an "intervening cause."

When an intervening cause breaks the connection between a defendant's negligent act and a plaintiff's injury, a defendant's negligent act is no longer a "responsible cause" of that plaintiff's injury.

Comments

In general, a defendant's act is a proximate cause of an injury if the injury is the natural and probable consequence of the act and should have been reasonably foreseen and anticipated in light of the circumstances. *Scott v. Retz*, 916 N.E.2d 252, 257–58 (Ind. Ct. App. 2009). The chain of proximate causation can be broken if an independent agency intervenes between the defendant's negligence and the resulting injury. *Scott*, 916 N.E.2d at 257. The key to determining whether an intervening agency has broken the original chain of causation is whether, under the circumstances, it was reasonably foreseeable that the agency would intervene in such a way as to cause the resulting injury." *Scott*, 916 N.E.2d at 257; *see also Conder v. Hull Lift Truck, Inc.*, 435 N.E.2d 10, 14 (Ind. 1982). The analysis has three factors—whether the intervening actor: (1) is independent from the original actor, (2) has complete control over the instrumentality of the harm, and (3) is in a better position than the original actor to prevent the harm. *Scott*, 916 N.E.2d at 258.

The doctrines of causation and foreseeability impose the same limitations on liability as the "superseding cause" doctrine A superseding cause is, by definition, one that is not reasonably foreseeable. As a result, the doctrine in today's world adds nothing to the requirement of foreseeability that is not already inherent in the requirement of causation.

Control Techniques, Inc. v. Johnson, 762 N.E.2d 104, 108 (Ind. 2002). This instruction is, therefore, not required; trial courts may, however, elect to give it if it would aid the jury in determining liability. *Control Techniques, Inc.*, 762 N.E.2d at 110.

1121 Defendant Takes Plaintiff as He Finds Him

[Defendant] is not excused from responsibility just because [plaintiff] had [describe physical or mental condition] at the time of [the collision][the incident][describe event] that made [him][her] more likely to be injured.

Comments

This instruction applies to the eggshell skull plaintiff. W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 43, p. 291-92 (5th ed. 1984). A defendant takes his plaintiff as he finds him. *Morton v. Merrillville Toyota, Inc.*, 562 N.E.2d 781, 785 (Ind. Ct. App. 1990). This includes when the plaintiff has osteoporosis, hemophilia, or another similar condition.

1122(A) Pre-existing Conditions; Aggravation

A pre-existing condition is a [physical][mental] condition that existed before [the collision][the incident][*describe event*].

[*Plaintiff*] may recover damages for the extent that [*defendant*] aggravated [*plaintiff*]'s [*specify pre-existing condition*].

[*Plaintiff*] cannot, however, recover damages for [*specify pre-existing condition*] itself.

Comments

This instruction should only be given if the facts of the case warrant it.

1122(B) Post-Incident Conditions; Aggravation

[*Plaintiff*] is [also] not entitled to recover damages for any condition that occurred after, and was not caused by, [the collision][the incident][*describe event*].

Comments

This instruction should only be given if the facts of the case warrant it.

1123 Concurring Acts of Negligence of Two or More Persons: Common Law Negligence Cases Only

When the negligence of two [or more] people combines to become the responsible cause of an injury or harm, and the injured person is not contributorily negligent, then the injured person may recover damages from any or all persons causing the harm, and [neither person][none of those people] can claim the negligence of the other[s] as a defense.

Comments

Where separate and independent acts of negligence combine to cause injury, and it is not possible to determine in what proportion each contributed, any or all defendants may be held responsible for the injury, and none of the defendants can claim as a defense that another's concurrent negligence contributed to the injury. *E.Z. Gas, Inc. v. Hydrocarbon Transp., Inc.*, 471 N.E.2d 316 (Ind. Ct. App. 1984); *Jackson v. Warrum*, 535 N.E.2d 1207 (Ind. Ct. App. 1989); *Swallow Coach Lines Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938); *Dunbar v. Demaree*, 102 Ind. App. 585, 2 N.E.2d 1003 (1936).

While plaintiff may obtain several judgments against concurrently negligent defendants, plaintiff is entitled to only one recompense. *Sanders v. Cole Municipal Finance*, 489 N.E.2d 117 (Ind. Ct. App. 1986).

This instruction applies in common law negligence cases only. The Comparative Fault Act replaced joint and several liability with several liability, leaving each defendant responsible only for its share of the total liability. *R.L. McCoy v. Jack*, 772 N.E.2d 987, 989–90 (Ind. 2002); *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 109 (Ind. 2002); Matthew Bender, 2 Comparative Negligence § 13.30[3][c] (2001) (“The Indiana statute expressly incorporates several liability.”).

Parties and courts encounter difficulty when one of the plaintiff's claims is subject to the Comparative Fault Act but another is not. *See, e.g., State v. Snyder*, 594 N.E.2d 783, 786–87 (Ind. 1992) (consistency of verdicts where the State is a party); *Huffman v. Monroe County Comm. School Corp.*, 588 N.E.2d 1264, 1266–67 (Ind. 1992) (application of the common law “release rule”); *State v. Schuetter*, 503 N.E.2d 418, 421 (Ind. Ct. App. 1987) (governmental and non-government defendants in same action). Parties who find themselves faced with prosecuting or defending mixed-theory cases may file separate law suits or request separate trials. *Snyder*, 594 N.E.2d at 787; *Schuetter*, 503 N.E.2d at 421.

1125 Last Clear Chance: Common Law Negligence Only

A plaintiff may be excused from contributory negligence if a defendant had the “last clear chance” to avoid the harm.

If you conclude [plaintiff] was contributorily negligent, you may excuse [plaintiff] from that contributory negligence if [plaintiff] proves all of the following:

- (1) [Defendant] was negligent;
- (2) [Plaintiff] was in immediate danger and could not free [himself][herself] from that danger;
- (3) [Defendant] knew that [plaintiff] was in immediate danger;
- (4) [Defendant] knew that [plaintiff] could not free [himself][herself] from that danger;
- (5) [Defendant] had the time and ability to avoid [injury][damage] to [plaintiff] but did not use reasonable care to do so; and
- (6) [Defendant]’s failure was the responsible cause of [injury][damage] to [plaintiff].

Comments

Under the last clear chance doctrine, even if the plaintiff was contributorily negligent (which would ordinarily bar the plaintiff’s recovery), he or she can still recover if the defendant had the “last clear chance” to avoid the harm, but failed to do so.

The doctrine applies only in contributory negligence cases, not in comparative fault cases. *Hull v. Taylor*, 644 N.E.2d 622, 624–25 (Ind. Ct. App. 1994).

1127 Incurred Risk/Assumed Risk—Common Law Negligence Only

[Defendant] claims [plaintiff] knew of a specific danger, understood the risk [he][she][it] faced, and voluntarily exposed [herself][himself][itself] to the danger. In other words, [defendant] claims [plaintiff] voluntarily [incurred][assumed] the risk.

To prove [plaintiff][incurred][assumed] the risk, [defendant] must prove by the greater weight of the evidence that:

- (1) [plaintiff] knew and appreciated the specific risk; and
- (2) [plaintiff] voluntarily accepted the risk.

If you decide that [plaintiff][incurred][assumed] the risk, your verdict should be for [defendant].

Comments

The term “incurred risk” has been used interchangeably with “assumed risk” in case opinions. “Assumed risk” differs from “incurred risk,” if at all, only in that assumed risk arises where there is a contractual relationship. *Alexandria v. Allen*, 552 N.E.2d 488 (Ind. Ct. App. 1990); *Kroger Co. v. Haun*, 177 Ind. App. 403, 379 N.E.2d 1004, 1008 n.2 (1978) (citing *Coleman v. De Moss*, 144 Ind. App. 408, 246 N.E.2d 483 (1969)).

This instruction should be retained for traditional negligence cases, such as actions against governmental entities or public employees and actions against health care providers. It should be noted, however, that the Indiana Supreme Court and Court of Appeals agree that incurred or assumed risk “has little legitimate application in the medical malpractice context. . . . ‘[T]he disparity in knowledge between professionals and their clientele generally precludes recipients of professional services from knowing whether a professional’s conduct is in fact negligent.’ ” *Spar v. Cha*, 907 N.E.2d 974, 982 (Ind. 2009) (quoting *Morrison v. MacNamara*, 407 A.2d 555, 567 (D.C. 1979) (citations omitted); accord *Smith v. Hull*, 659 N.E.2d 185, 194 n.6 (Ind. Ct. App. 1995) (Sullivan, J., concurring)). As a result, there is virtually no scenario in which a patient can consent to a doctor using less than ordinary care. *Spar*, 907 N.E.2d at 982 (citing *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 884 (Del. Super. Ct. 2005)). A patient is entitled to expect that standard of care, however risky the procedure may be. *Spar*, 907 N.E.2d at 982.

The Indiana Court of Appeals recommended an earlier version of this instruction in *Stowers v. Clinton Cent. Sch. Corp.*, 855 N.E.2d 739 (Ind. Ct. App. 2006). For consideration of the doctrine in comparative fault cases, see the commentary to Instruction No. 921.

Spar delineates four types of incurred or assumed risk:

- (1) Express: plaintiff has given express consent to relieve defendant of the duty to use ordinary care and agrees to take his chances of injury from a known or possible risk.
- (2) Implied primary: plaintiff has voluntarily entered into a relation with defendant which plaintiff knows to involve risk, so that plaintiff is deemed to impliedly agree to relieve defendant of the duty to use ordinary care. For

example, a spectator at a baseball game consents to the lack of precautions against being hit by the ball.

- (3) Implied secondary: plaintiff is aware of the risk caused by defendant's negligence, and proceeds or continues to voluntarily encounter it. For example, an independent contractor who knows his principal has given him a machine in dangerous condition but continues to work with it consents to injury caused by the machine.
- (4) Unreasonable: plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence.

Spar, 907 N.E.2d at 980 (citing Restatement 2d Torts § 496A cmt. c (1965); W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 68, at 480–81, 496–97 (5th ed. 1984)). The first three categories are predicated on plaintiff's express or implied consent, and under Indiana law, that consent “must be based on actual knowledge of the risk, not merely ‘general awareness of a potential for mishap.’” *Spar*, 907 N.E.2d at 981 (quoting *Clark v. Wiegand*, 617 N.E.2d 916, 918 (Ind. 1993) (quoting *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552, 554 (Ind. 1987))).

Because express and implied primary incurred risk negate the duty of care, they negate an element of negligence, and therefore do “‘not look much like an orthodox affirmative defense.’” *Spar*, 907 N.E.2d at 981 (quoting 1 Dan B. Dobbs, *The Law of Torts*, § 212 (2001)). Although these two forms of assumption of risk may not require pleading as an affirmative defense under Trial Rule 8, the burden of proof to establish the plaintiff's consent is on the defendant. *Spar*, 907 N.E.2d at 981 (citing Dobbs § 212 n.4; *see also* Restatement 2d Torts § 496G cmt. c).

Implied secondary assumption of risk does not negate the defendant's duty of care; it asserts the plaintiff's conduct as a defense to the defendant's negligence or breach and therefore is a classic affirmative defense. *Spar*, 907 N.E.2d at 981 (citing *Blackburn v. Dorta*, 348 So. 2d 287, 290 (Fla. 1977); *see also Gyuriak v. Millice*, 775 N.E.2d 391, 394–95 (Ind. Ct. App. 2002)).

Although assumed risk and contributory negligence may in some cases be supported by the same facts, they are separate defenses. *Spar*, 907 N.E.2d at 981 (citing *Richardson v. Marrell's, Inc.*, 539 N.E.2d 485, 486 (Ind. Ct. App. 1989)). “‘[A]ssumption of risk rests upon the voluntary consent of the plaintiff to encounter the risk and take his chances, while contributory negligence rests upon his failure to exercise the care of a reasonable man for his own protection.’” *Spar*, 907 N.E.2d at 981 (quoting Restatement 2d Torts § 496A cmt. d).

Similarly, lack of informed consent and incurred risk are distinct tort concepts. *Spar*, 907 N.E.2d at 981. Failure to obtain informed consent is based on negligent failure to disclose matters that the standard of care demands the physician make known to the patient, while incurred risk is a defense to negligence claims based on plaintiff's express or implied consent to relieve the defendant of the duty of care, or on the plaintiff's choice to voluntarily encounter a risk already created by the defendant's negligence. *Spar*, 907 N.E.2d at 981 (citing *Faile v. Bycura*, 297 S.C. 58, 374 S.E.2d 687, 688 (S.C. Ct. App. 1988)).

The essence of incurred risk is conscious, deliberate, and intentional action with knowledge of the circumstances. *Power v. Brodie*, 460 N.E.2d 1241, 1243 (Ind. Ct.

App. 1984). It requires much more than the general awareness of a potential for mishap; it contemplates acceptance of a specific risk about which plaintiff actually knows. *Power*, 460 N.E.2d at 1243; see also *Hopper v. Carey*, 716 N.E.2d 566 (Ind. Ct. App. 1999); *Kostidis v. General Cinema Corp.*, 754 N.E.2d 563, 571 (Ind. Ct. App. 2001). Incurred risk also involves a mental state of venturousness on plaintiff's part. *Clark v. Wiegand*, 617 N.E.2d 916 (Ind. 1993).

Assumed risk is generally a question of fact for the trier of fact and may be found as a matter of law "only if the evidence is without conflict and the sole inference to be drawn is that the plaintiff (a) had actual knowledge of the specific risk, and (b) understood and appreciated the risk." *Alexandria v. Allen*, 552 N.E.2d 488, 497 (Ind. Ct. App. 1990) (quoting *Stainko v. Tri-State Coach Lines, Inc.*, 508 N.E.2d 1362, 1364 (Ind. Ct. App. 1987)).

1129 Negligence or Contributory Negligence—Children

[Child] was _____ years old at the time of the incident.

Child under the age of 7 years

A child under the age of seven (7) cannot be held legally responsible for [his][her] actions. Therefore, you cannot decide that a child under seven years of age was negligent.

Child between the ages of 7 and 14 years

A child between the ages of seven (7) and fourteen (14) must use the same care that a reasonably careful child of the same age, knowledge, judgment, and experience would use in the same situation.

Child over age 14 years

[Absent special circumstances], a child over the age of fourteen (14) must use the same care as an adult.

Comments

Indiana has a three-tiered analysis for determining the contributory negligence of children: (1) children under the age of 7 years are conclusively presumed to be incapable of negligence, (2) children from 7 to 14 are rebuttably presumed to be incapable of negligence, and children must use the care that a child of similar age, knowledge, judgment, and experience would use under the circumstances, and (3) absent special circumstances, children over the age of fourteen are charged with the standard of care of an adult. *Creasy v. Rusk*, 730 N.E.2d 659 (Ind. 2000); *Smith v. Diamond*, 421 N.E.2d 1172, 1177–79 (Ind. Ct. App. 1981).

Whether a child was contributorily negligent is generally a question of fact for the jury to decide. See, e.g., *Maldonado v. Gill*, 502 N.E.2d 1371, 1373 (Ind. Ct. App. 1987).

For a discussion of the development of law in this area and a comparison with the law in other jurisdictions, see *Smith v. Diamond*, 421 N.E.2d 1172 (Ind. Ct. App. 1981).

For contributory negligence cases, use this language for the between 7 and 14 category:

You may assume that a child between the ages of seven (7) and fourteen (14) was not contributorily negligent. [Defendant] may overcome this assumption by proving that the child, based on his age, mental capacity, intelligence, and experience should be responsible for his or her actions.

If you decide that the child should be responsible for his or her actions, he or she must have used the same care that a reasonably careful child of the same age, knowledge, judgment, and experience would use in the same situation.

See *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292 (Ind. 2009).

1131 Negligence of a Parent

A child is not responsible for [his][her][parent's][guardian's][custodian's] conduct. Therefore, if you decide that [parent, guardian, or custodian] was negligent, you may not decide that [child] was negligent for [parent, guardian, or custodian]'s conduct.

Comments

The negligence of a parent or custodian of a child is not imputable to the child in an action by the child for injury caused by defendant's negligence. *J. F. Darmody Co. v. Reed*, 60 Ind. App. 662, 111 N.E. 317 (1916); *Jeffersonville v. McHenry*, 22 Ind. App. 10, 53 N.E. 183 (1899); *Terre Haute, I. & E. Traction Co. v. Stevenson*, 73 Ind. App. 294, 126 N.E. 34 (1920); *Evansville v. Senhenn*, 151 Ind. 42, 47 N.E. 634 (1897).

1133 Sudden Emergency

[Plaintiff][Defendant] claims [he][she] was not negligent because [he][she] acted with reasonable care in an emergency situation. [Plaintiff][Defendant] was not negligent if [he][she] proves the following by the greater weight of the evidence:

- (1) [he][she] was faced with a sudden emergency;
- (2) [he][she] did not cause the emergency;
- (3) [he][she] did not have enough time to consider [his][her] options; and
- (4) [he][she] acted as a reasonably careful person would act when facing a similar emergency, even if a different course of action might later seem to have been a better choice.

Comments

“In a negligence cause of action, the sudden emergency doctrine is an application of the general requirement that one’s conduct conform to the standard of a reasonable person. The emergency is simply one of the circumstances to be considered in forming a judgment about an actor’s fault. . . . The sudden emergency doctrine does not impose a lesser standard of care on a person presented with an emergency. The individual is still expected to respond to the situation as a reasonably prudent person under the circumstances.” *Willis v. Westerfield*, 839 N.E.2d 1179, 1184, 1186 (Ind. 2006) (citations omitted). *Willis* held that the sudden emergency doctrine is not an affirmative defense within the meaning of T.R. 8(C). Because the parties did not raise whether the instruction correctly stated the law, the Court expressed “no opinion as to the desirability of such an instruction or any other potential challenge to the specific language used in this case.” *Willis*, 839 N.E.2d at 1186.

After *Willis*, it is unclear whether the appellate courts favor a trial court’s instruction on sudden emergency. *But cf. Sullivan v. Fairmont Homes, Inc.*, 543 N.E.2d 1130, 1137 (Ind. Ct. App. 1989) (“If the court determines that these conditions have been met, the jury may be instructed that if it finds a reasonable person confronted with the same circumstances might have reacted in the same fashion, even though another course of conduct might have been more judicious, or safer, or might even have avoided the accident, it may still find the actor’s conduct not to be negligent.”)

Collins v. Rambo explains that the sudden emergency doctrine applies only in narrow circumstances. 831 N.E.2d 241 (Ind. Ct. App. 2005) (holding that the sudden emergency doctrine did not apply in a case in which the driver was following too closely behind another a vehicle). The cases outlining the doctrine recite three factual prerequisites to an instruction on the rule: (1) the actor must not have created or brought about the emergency through his own negligence, (2) the danger or peril confronting the actor must appear to be so imminent as to leave no time for deliberation, and (3) the actor’s apprehension of the peril must itself be reasonable. *See, e.g., Barnard v. Himes*, 719 N.E.2d 862 (Ind. Ct. App. 1999).

Cases have characterized the third factor as a requirement that the actor’s conduct under the circumstances conform to that of an ordinarily prudent person under like or similar circumstances. *Bundy v. Ambulance Indianapolis Dispatch, Inc.*, 158 Ind.

App. 99, 301 N.E.2d 791 (1973); *Stein v. Yung*, 475 N.E.2d 52 (Ind. Ct. App. 1985). Although earlier cases seemed to imply that the peril the actor sought to avoid must have been created by a party to the lawsuit or by some third person, the Court of Appeals has since held the peril may be created by inclement weather conditions or other natural circumstances. *Sullivan*, 543 N.E.2d at 1137.

The proponent of the sudden emergency doctrine bears the burden of proof. *Willis*, 839 N.E.2d at 1185.

1134 Rescue

A person who has, through his [negligence][*other standard of care*], endangered the safety of another may be held liable for injuries sustained by a third person in attempting to save such other from injury.

You may hold [*defendant*] liable for [*plaintiff*]'s injuries if you find that:

1. [*defendant*][negligently][*other standard of care*] endangered [*rescued person*]
2. [*plaintiff*] attempted to prevent further harm to [*rescued person*],
3. [*plaintiff*]'s attempt was reasonable under the circumstances.

Comments

"One who has, through his negligence, endangered the safety of another may be held liable for injuries sustained by a third person in attempting to save such other from injury." *Neal v. Home Builders, Inc.*, 111 N.E.2d 280, 284 (1953). For the rescue doctrine to apply, the rescuer must in fact undertake physical activity in a reasonable and prudent attempt to rescue someone. *Lambert v. Parrish*, 492 N.E.2d 289, 291 (Ind. 1986).

1135 Intoxication—No Excuse or Justification

An intoxicated person is held to the same standard of care as someone who is not intoxicated. Intoxication does not excuse or justify a person's failure to act as a reasonably careful person.

Comments

This instruction should be used in traditional negligence cases. Indiana Code § 9-13-2-86 defines "intoxicated."

Evidence a driver was intoxicated is sufficient to show wanton or willful misconduct within the meaning of Indiana's guest statute. *Williams v. Crist*, 484 N.E.2d 576 (Ind. 1985); *see also Davis v. Stinson*, 508 N.E.2d 65 (Ind. Ct. App. 1987); *Booker, Inc. v. Morrill*, 639 N.E.2d 358 (Ind. Ct. App. 1994). The *Booker* court explained that, although a driver may have voluntarily and intentionally become intoxicated, that intentional act does not necessarily make the person's conduct in causing the injury and loss intentional; the conduct causing the injury is the focus for the purpose of determining fault. *Booker*, 639 N.E.2d at 362.

For an intoxicated person to be deemed contributorily negligent, the intoxication must lead to negligent conduct, and the conduct must be the proximate cause of the injuries. *State v. Snyder*, 732 N.E.2d 1240 (Ind. Ct. App. 2000).

1137 Duty to Minimize (Mitigate) Damages—Common Law Negligence Cases

A plaintiff must use reasonable care to minimize [his][her] damages.

[Plaintiff] may not recover for any item of damage that [he][she] could have avoided through the use of reasonable care.

[Defendant] has the burden of proving by the greater weight of the evidence that [plaintiff] failed to use reasonable care to minimize [his][her] damages.

Comments

A plaintiff “ ‘may not recover for any item of damage that [the plaintiff] could have avoided through the use of reasonable care.’ ” *Kocher v. Getz*, 824 N.E.2d 671, 675 (Ind. 2005) (quoting former Indiana Pattern Jury Instruction No. 11.120 (2003)). “Put simply, a plaintiff in a negligence action has a duty to mitigate his or her post-injury damages, and the amount of damages a plaintiff is entitled to recover is reduced by those damages which reasonable care would have prevented.” *Buhring v. Tavoletti*, 905 N.E.2d 1059, 1064 (Ind. Ct. App. 2009) (citing *Willis v. Westerfield*, 839 N.E.2d 1179, 1187 (Ind. 2006)). In other words, a jury can reduce the plaintiff’s final damages award based on the plaintiff’s post-injury failure to mitigate damages.

The defendant bears the burden of proving both elements of the affirmative defense of post-injury failure to mitigate damages: (1) that the plaintiff failed to exercise reasonable care to mitigate his or her post-injury damages, and (2) that the plaintiff’s failure to exercise reasonable care caused the plaintiff to suffer an identifiable item of harm not attributable to the defendant’s negligent conduct. *Willis*, 839 N.E.2d at 1188.

It is not enough to establish that the plaintiff acted unreasonably. The defendant must establish resulting identifiable quantifiable additional injury, just as the plaintiff must prove harm resulting from the defendant’s acts. When, as here, a defendant claims that after an accident a plaintiff unreasonably failed to follow medical advice, in order to establish a failure to mitigate, the defendant must also prove that the plaintiff’s actions caused the plaintiff to suffer a discrete, identifiable harm arising from that failure, and not arising from the defendant’s acts alone.

Willis, 839 N.E.2d at 1188.

The failure to mitigate damages is not a defense to the ultimate issue of liability, unless the plaintiff’s alleged failure to mitigate damages occurs before the accident or initial injury. *Kocher v. Getz*, 824 N.E.2d 671, 676 (Ind. 2005); *Deible v. Poole*, 691 N.E.2d 1313 (Ind. Ct. App. 1998), *adopted in* 702 N.E.2d 1076 (Ind. 1998). For a plaintiff’s pre-injury failure to mitigate, *see* the comments to Instruction No. 935.

Whether a post-injury failure to mitigate defense requires expert testimony to establish causation must be resolved on a case-by-case basis; trial courts should analyze whether a lay juror can determine that a particular item of harm was caused by a plaintiff’s unreasonable post-injury disregard. *Willis*, 839 N.E.2d at 1188 (holding that trial court erred in giving a failure to mitigate instruction because defendant failed to carry his burden to prove that plaintiff’s post-injury disregard of advice as to treatment increased her harm, and if so, by how much); *see also Mroz*

v. Harrison, 815 N.E.2d 551, 556–57 (Ind. Ct. App. 2004); *Wilkinson v. Swafford*, 811 N.E.2d 374, 384 (Ind. Ct. App. 2004); *Kristoff v. Glasson*, 778 N.E.2d 465, 474 (Ind. Ct. App. 2002).

The failure to mitigate damages defense is commonly raised in the context where a patient has failed to heed the advice of treating medical personnel. *See, e.g., Sikora v. Fromm*, 782 N.E.2d 355, 362 (Ind. Ct. App. 2002), (holding that trial court did not err in refusing to instruct on failure to mitigate when defendant did not present evidence that plaintiff’s failure to follow up with prescribed treatment aggravated plaintiff’s injuries).

Com. Law Neg.:
Claims v. Govt.

1139 Violation of Statutory Duty as Negligence

When the events in this case happened, [Indiana Code § _____][*ordinance number and name*] provided [in part] as follows: [*here set out applicable portions of statute or ordinance*].

If you decide from the greater weight of the evidence that a person violated [Indiana Code § _____][*ordinance number and name*], and that the violation was not excused, then you must decide that person was negligent.

Comments

A judge giving this instruction should also give Instruction Nos. 917 (responsible cause), 909 (negligence).

Ordinances are local laws enacted by local government. Ordinances are presumed to be valid. However, an ordinance may not prohibit what a statute expressly permits or may not permit what a statute prohibits. If the state has not chosen to occupy an area to the exclusion of municipal regulation, a city, county, or town may impose additional, reasonable regulations, and may supplement burdens imposed by non-penal state law, provided the additional burdens are logically consistent with the statutory purpose. *Hobble v. Basham*, 575 N.E.2d 693 (Ind. Ct. App. 1991).

While a court may copy into an instruction pertinent parts of a statute and read them as a part of the written instructions, *Vandalia Coal Co. v. Moore*, 69 Ind. App. 311, 121 N.E. 685 (1919), judges should take care to ensure that the statute is comprehensible to jurors. When more than one statutory violation is alleged, the Committee recommends incorporating all statutory provisions in one instruction. If there is no evidence or inference of excuse for violating a statute, the clause relating to excuse should be omitted.

Generally, the violation of a statute or ordinance that imposes a duty is negligence per se toward those persons the law is designed to protect. *Zimmerman v. Moore*, 441 N.E.2d 690 (Ind. Ct. App. 1982). For the violation of a statute to be negligence per se, the statute must prescribe an absolute duty so that the jury need not consider the surrounding circumstances to determine whether the actor exercised reasonable care. *Peaches v. Evansville*, 180 Ind. App. 465, 389 N.E.2d 322 (1979). The statute must not have been enacted for a wholly different purpose than to prevent the alleged injury, and the statute must be designed to protect the class of people to which the plaintiff belongs. *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966).

Negligence per se does not necessarily mean liability per se because proximate cause must still be proven. *Blankenship v. Huesman*, 173 Ind. App. 98, 362 N.E.2d 850 (1977); *New York C. R. Co. v. Glad*, 242 Ind. 450, 179 N.E.2d 571 (1962). Judges should therefore give the responsible (proximate) cause instruction along with this instruction.

In addition, while a statutory violation is generally negligence per se, it is sometimes merely *prima facie* evidence of negligence, and whether a statutory violation is negligent conduct may become a jury question because circumstances may excuse technical violations. *Larkins v. Kohlmeyer*, 229 Ind. 391, 400, 98 N.E.2d 896, 900 (1951); *see also Phoenix Natural Res., Inc. v. Messmer*, 804

N.E.2d 842, 848 (Ind. Ct. App. 2004); *Wallace v. Hjelm*, 141 Ind. App. 686, 142 Ind. App. 686, 231 N.E.2d 862 (1967); *but see Hancock Truck Lines, Inc. v. Butcher*, 229 Ind. 36, 94 N.E.2d 537 (1950) (no error to instruct jury that statutory violation was negligence as a matter of law, when there was no evidence or inference of facts that would excuse such conduct); *Northern Ind. Transit, Inc. v. Burk*, 228 Ind. 162, 89 N.E.2d 905 (1950) (same).

1141 Excuse from Statutory Violation

A person may be excused from failing to comply with [a statute][an ordinance] if [he][she] proves by the greater weight of the evidence that:

- (1) The [statute][ordinance] provided a specific excuse;
- (2) Compliance was impossible;
- (3) Noncompliance was excusable because of circumstances:
 - (a) beyond the person's control, and
 - (b) not the result of the person's negligence; or
- (4) The person who violated the [statute][ordinance] exercised reasonable care under the circumstances and desired to comply with the law.

Comments

While a statutory violation is generally negligence per se, it is sometimes merely *prima facie* evidence of negligence, and whether a statutory violation is negligent conduct may become a jury question, because circumstances may excuse technical violations. *Hill v. Gephart*, 54 N.E.3d 402 (Ind. Ct. App. 2016); *Larkins v. Kohlmeyer*, 229 Ind. 391, 400, 98 N.E.2d 896, 900 (1951); *see also Phoenix Natural Resources, Inc. v. Messmer*, 804 N.E.2d 842, 848 (Ind. Ct. App. 2004); *Wallace v. Hjelm*, 141 Ind. App. 686, 142 Ind. App. 686, 231 N.E.2d 862 (1967); *but see Hancock Truck Lines v. Butcher*, 229 Ind. 36, 94 N.E.2d 537 (1950) (no error to instruct jury that statutory violation was negligence as a matter of law, when there was no evidence or inference of facts that would excuse such conduct); *Northern Ind. Transit, Inc. v. Burk*, 228 Ind. 162, 89 N.E.2d 905 (1950) (same).

1142(A) Mixed Comparative Fault and Common Law Defendants—If All Parties Agree—Judge Calculates Judgment Against Each Defendant

To decide if [*plaintiff*] is entitled to recover damages from [*comparative fault defendant*] or [*common law defendant*] or both, and if so, the amount of those damages, apportion the fault of [*plaintiff*], [*defendants*], and [*identified nonpart(y)(ies)*] on a percentage basis. Do this as follows:

First, if neither [*comparative fault defendant*] nor [*common law defendant*] is at fault, return your verdict for [*comparative fault defendant*] and [*common law defendant*], and against [*plaintiff*], and deliberate no further. (*Use Verdict Form 5003(A).*)

If either [*comparative fault defendant*] or [*common law defendant*] is at fault, decide their percentages of fault, and the percentage of fault, if any, of [*plaintiff*] and [*identified nonpart(y)(ies)*] that caused [*plaintiff*]'s injuries. These percentages must total 100 percent. Do not apportion fault to any other person or entity.

Finally, decide the total amount of [*plaintiff*]'s damages, if any. Do not consider fault when you decide this amount. (*Use Verdict Form 5004.*)

Based on the law, the percentages of fault you allocate, and the total amount of damages in your verdict, I will calculate the amount of money, if any, [*plaintiff*] is entitled to recover against either of the defendants.

The law treats these defendants differently. The law requires that:

- (1) If [*plaintiff*]'s fault is greater than 50 percent, [*plaintiff*] cannot recover damages against either [*comparative fault defendant*] or [*common law defendant*].
- (2) If [*plaintiff*]'s fault is greater than 0 percent, [*plaintiff*] cannot recover damages against [*common law defendant*].

I will give you verdict forms that will help guide you through this process.

Comments

Ind. Code § 34-51-2-8 provides the manner in which the jury is to determine damages in a comparative fault case. When comparative fault principles collide with common law negligence principles, determining damages becomes exceedingly complicated and confusing for the jury. In cases involving both comparative fault and common law negligence defendants, therefore, it is recommended that the parties agree that the trial judge will calculate the damages against each defendant. If the parties so agree, this Instruction, along with Verdict Forms 5003(A) and 5004, should be given.

The parties and the judge should attempt to reach this agreement well before trial to avoid the problems of trying cases involving both sets of principles in a single trial. If the parties do not agree that the judge should calculate the damages against each defendant, the judge should instruct the jury using Instruction No. 1142(B).

1142(B) Mixed Comparative Fault and Common Law Defendants

The law requires you to use different methods to decide if [plaintiff] is entitled to recover damages from [comparative fault defendant] or [common law defendant] or both, and if so, the amount of those damages.

Deliberations as to [common law defendant]	Deliberations as to [comparative fault defendant]
<p>If you decide that [common law defendant] was not negligent, or that [common law defendant] was negligent, but that [his][her][its] negligence was not a responsible cause of [plaintiff]’s injury, return your verdict for [common law defendant], and against [plaintiff], and deliberate no further as to [common law defendant]. (Use Verdict Form 5017.)</p> <p>If you decide that [plaintiff]’s own negligence contributed to the [injury][harm][plaintiff] claims to have suffered and that [plaintiff]’s negligence was a responsible cause of the [injury][harm], return your verdict for [common law defendant] and against [plaintiff] in this case, and deliberate no further as to [common law defendant]. (Use Verdict Form 5017.)</p> <p>However, if you decide that [common law defendant] was negligent, and that [plaintiff]’s own negligence did not contribute to the [injury][harm], then you must decide the amount of plaintiff’s damages caused by the negligence of [common law defendant] without comparing that negligence to the fault of any other defendant in this case. Return your verdict against [common law defendant] in that amount. (Use Verdict Form 5013.)</p>	<p>If you decide that [comparative fault defendant] is not at fault, or that [comparative fault defendant] was at fault, but that [his][her][its] fault was not a responsible cause of [plaintiff]’s injury, return your verdict for [comparative fault defendant], and against [plaintiff], and deliberate no further as to [comparative fault defendant]. (Use Verdict Form 5001(A).)</p> <p>If [comparative fault defendant] is at fault, decide [his][her][its] percentage of fault, and the percentage of fault, if any, of [plaintiff], [common law defendant], and [identified nonpart(y)(ies)] that caused [plaintiff]’s injuries. These percentages must total 100 percent. Do not apportion fault to any other person or entity.</p> <p>If [plaintiff]’s fault is greater than 50 percent, return your verdict for [comparative fault defendant] and against [plaintiff] in this case; and deliberate no further. (Use Verdict Form 5003(B).) However, if you decide that [plaintiff]’s fault is 50 percent or less,</p> <p>(1) Decide the total amount of [plaintiff]’s damages, if any. Do not consider fault when you decide this amount.</p> <p>(2) Multiply [plaintiff]’s total damages by [comparative fault defendant]’s percentage of fault.</p> <p>(3) Return your verdict for [plaintiff] and against [comparative fault defendant] in the amount of the product of that multiplication. (Use Verdict Form 5003(C).)</p>

I will give you verdict forms that will help guide you through this process.

Comments

When comparative fault principles collide with common law negligence principles, determining damages becomes exceedingly complicated and confusing for the jury. In cases involving both comparative fault and common law negligence defendants, therefore, it is recommended that the parties agree that the trial judge will calculate

the damages against each defendant. Instruction No. 1142(A) was designed to be used when the parties so agree. The parties and the judge should attempt to reach this agreement well before trial to avoid the problems of trying cases involving both sets of principles in a single trial.

If the parties do not agree that the judge should calculate the damages against each defendant, the judge should instruct the jury using this Instruction.

1143 Respondeat Superior—Vicarious Liability

An employer is liable for the negligent act of its employee done within the scope of [his][her] employment if the act is a responsible cause of the injury to the Plaintiff.

An employee's negligent act is within the scope of employment when the employee's negligent act occurred while the employee was performing activities expressly or impliedly authorized by the employer.

The negligent act need not be intended to serve the employer, nor be authorized by the employer for it to fall within the scope of employment. The negligent act must come from a course of conduct the employee performs while in the employer's service.

Comments

The determination of whether an employee is acting within the scope of his employment is dependent upon the circumstances of each case and is generally a question of fact for the jury. *Gomez v. Adams*, 462 N.E.2d 212, 223 (Ind. Ct. App. 1984); *Gibbs v. Miller*, 283 N.E.2d 592 (Ind. Ct. App. 1972).

Indiana does not require a plaintiff to prove that an employee's negligent or wrongful act was done with a purpose to serve the employer. Other jurisdictions do require a plaintiff to prove this purpose to serve the master/employer as an element. See *State v. Schallock*, 189 Ariz. 250, 258, 941 P.2d 1275, 1283 (1997); *Iandiorio v. Kriss & Senko Enterprises, Inc.*, 512 Pa. 392, 397–98, 517 A.2d 530, 533 (1986); *Sheldon v. Kettering Health Network*, 2015-Ohio-3268, ¶¶ 14–15, 40 N.E.3d 661, 668–69 (2d. Dist.).

The committee amended vicarious liability instructions in response to *Cox v. Evansville Police Dep't.*, 107 N.E.3d 453 (Ind. 2018):

To be clear, the focus in determining the scope of employment “must be on how the employment relates to the context in which the commission of the wrongful act arose.” *Barnett*, 889 N.E.2d at 285 (quoting *Stropes*, 547 N.E.2d at 249). When tortious acts are so closely associated with the employment that they arise naturally or predictably from the activities an employee was hired or authorized to do, they are within the scope of employment, making the employer liable. *West*, 81 N.E.3d at 1072–73. But tortious acts are not within the scope of employment when they flow from a course of conduct that is independent of activities that serve the employer. *Barnett*, 889 N.E.2d at 283–84.

Cox, 107 N.E.3d at 461.

The court in *Cox* also recognized the special case of a police officer misusing employer conferred power and authority in finding a city liable if the conduct arose naturally or predictably from the officer's employment activities. The reasoning of the court was as follows:

The reason underlying scope-of-employment liability support this conclusion. First, the city benefits from the lawful exercise of police power, so when tortious abuse of that power naturally or predictably flows from employment activities, the city equitably bears the cost of the victim's loss. See *West*, 81 N.E.3d at 1072–73. And second, holding the city liable encourages it to

guard against recurrent assaults. Particularly because cities vest considerable power and authority in police officers, we want cities to exercise vigilance in hiring and supervising officers. *See Waymire*, 114 F.3d at 649.

So the scope-of-employment rule, shaped by its underlying policies, allows employer liability for an officer's sexual assault. We stress that the unique authority that cities vest in police officers drives this conclusion.

Cox, 107 N.E.3d at 463. Additionally, in *Burton v. Benner*, 140 N.E.3d 848 (Ind. 2020), the Indiana Supreme Court held that there was no genuine issue of material fact as to whether a police officer was acting **clearly outside** the scope of his employment when he was operating his police vehicle at the time he was involved in an auto accident. The officer's conduct was the same general nature was authorized by police policy; he was maintaining radio contact, conforming to the dress code and could suddenly be available for official duties. *Id.* at 853.

The following instruction was affirmed in *Walgreen Co. v. Hinchey*, 21 N.E.3d 99 (Ind. Ct. App. 2014):

An employer is liable for the wrongful acts of its employee which are committed within the scope of employment.

An act is within the scope of employment if it is incidental to the employee's job duties, that is to say, the employee's wrongful act originated in activities closely associated with her job.

In deciding whether an employee's wrongful act was incidental to her job duties or originated in activities closely associated with her job, you may consider:

1. Whether the wrongful act was of the same general nature as her authorized job duties;
2. Whether the wrongful act is intermingled with authorized job duties; and
3. Whether the employment provided the opportunity or the means by which to commit the wrongful act.

Id. at 110–111. The definition of “incidental” included in the instruction was derived from *Celebration Fireworks*, 727 N.E.2d at 453; *Wilson v. Isaacs*, 917 N.E.2d 1251 (Ind. Ct. App. 2009), *vacated in part by* 929 N.E.2d 200 (Ind. 2010); *Ellis v. City of Martinsville*, 940 N.E.2d 1197 (Ind. Ct. App. 2011); *Smith v. Ind. Dep't of Corr.*, 871 N.E.2d 975, 986 (Ind. Ct. App. 2007). *Walgreen Co.*, 21 N.E.3d at 110–11. Other cases have included a factor that considers whether the act was done to further the employer's business. *Bushong v. Williamson*, 790 N.E.2d 467, 473 (Ind. 2003). However, the approved instruction did not include whether the act was “to further his employer's business.”

For instructions concerning agency and related issues, *see* Series 3500.

1144 Respondeat Superior—Constructive Knowledge of Employer

Knowledge of [*defendant*]'s agent or employee acquired within the scope employment is knowledge of [*defendant*], regardless of whether the agent or employee shared [his][her] knowledge with anyone else.

Comments

Southport Little League v. Vaughan, 734 N.E.2d 261, 275 (Ind. Ct. App. 2000):

This court has long recognized that a principal is charged with the knowledge of that which his agent by ordinary care could have known where the agent has received sufficient information to awaken inquiry. *Travelers Ins. Co. v. Eviston*, 110 Ind. App. 143, 37 N.E.2d 310, 316 (1941). We have previously held that knowledge of material facts acquired by an agent in the course of his employment, and within the scope of his authority, is the knowledge of the principal, and where no actual knowledge of the principal is shown, the rule will be given the effect on the theory of constructive knowledge, resting on the legal principle that it is the duty of the agent to disclose to his principal all material facts coming to his knowledge, and upon the presumption that he has discharged that duty. *National Mut. Ins. Co. of Celina, Ohio v. Bales*, 81 Ind. App. 302, 139 N.E. 703 (1923). The Indiana Supreme Court has stated that:

Notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and, if he has not, still, the principal having entrusted the agent with the particular business, the other party has the right to deem his acts and knowledge obligatory upon the principal. *Field v. Campbell*, 164 Ind. 389, 72 N.E. 260, 263 (1904)

1145 Negligence of Party Providing Dangerous Item for Use by Another

If you find that:

- (1) [defendant], either directly or through a third person, provided an item for use by another person;
- (2) [defendant]:
 - (a) knew or had reason to know that the item was dangerous or was likely to be dangerous for the use for which it was provided; and
 - (b) had no reason to believe that the other person would realize the dangerous condition;
- (3) [defendant] did not use reasonable care to inform a person likely to use the item of the dangerous condition or of the facts that made it likely to be dangerous;
- (4) [plaintiff] was someone who [defendant] expected or should have expected:
 - (a) would be allowed to use the item, or
 - (b) would be endangered by the item's probable use;
- (5) a person whom [defendant] expected to use the item, did use it;
- (6) the item was used in the way [defendant] expected; and
- (7) the item's use caused physical harm to [plaintiff],

then [defendant] was negligent.

Comments

This instruction is a general instruction that applies to persons who in any way or for any purpose supply chattels for the use of others or permit others to use their chattels. Instruction No. 1147 is a general instruction that applies to persons who supply chattels for the use of others for a business purpose of the supplier. Breach of the indicated duties is evidence of negligence to be weighed against the negligence, if any, of the plaintiff. The Restatement of Torts, 2d should be consulted for additional rules upon the suppliers of chattels because of other purposes for which or the manner in which the chattels are supplied or because the chattel has been made by them or put out as their product.

1147 Negligence of Party Providing Dangerous Item for a Business Purpose of the Provider

If you find that:

- (1) [defendant], either directly or through a third person, provided an item to another person for [defendant]'s business purposes;
- (2) [defendant] either knew or should have discovered that the item had a dangerous condition or character;
- (3) [defendant] failed to:
 - (a) use reasonable care to make the item safe for the use for which it was provided; or
 - (b) inform the expected users of the item of its dangerous condition or character;
- (4) [plaintiff] was someone:
 - (a) for whose use [defendant] provided the item, or
 - (b) who [defendant] expected or should have expected would be endangered by the item's probable use;
- (5) the item was used by the person to whom it was provided;
- (6) the item was used in the way [defendant] expected; and
- (7) the item's use caused physical harm to [plaintiff],

then [defendant] was negligent.

Comments

While Instruction No. 1145 is a general instruction that applies to persons who in any way or for any purpose supply chattels for the use of others or permit others to use their chattels, this instruction is a general instruction that applies to persons who supply chattels for the use of others for a business purpose of the supplier. Breach of the indicated duties is evidence of negligence to be weighed against the negligence, if any, of the plaintiff. The Restatement of Torts, 2d should be consulted for additional rules upon the suppliers of chattels because of other purposes for which or the manner in which the chattels are supplied or because the chattel has been made by them or put out as their product.

CHAPTER 1200

CONSTITUTIONAL TORTS

SYNOPSIS

A. 42 U.S.C. § 1983—Excessive Force

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- 1202 Excessive Force—Non-Incarcerated Plaintiff and Pretrial Detainee Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Color of Law—Definition
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B. 8th Amendment—Excessive Force

- 1221 Excessive Force—Convicted Incarcerated Plaintiff—8th Amendment—Elements
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- 1223 Excessive Force—Convicted Incarcerated Plaintiff—8th Amendment—Scope of Force—Subjective Standard
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- 1227 Excessive Force—Convicted Incarcerated Plaintiff—8th Amendment—Two or More Defendants
- 1229 Excessive Force—Convicted Incarcerated Plaintiff—8th Amendment—Failure to Intervene

A. 42 U.S.C. § 1983—Excessive Force

1201 Excessive Force—Non-Incarcerated Plaintiff and Pretrial Detainee Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Elements

In this case, [plaintiff] claims that [defendant] used excessive force against [him][her]. To recover on this claim, [plaintiff] must prove by the greater weight of the evidence that:

- 1) [defendant] used unreasonable force against [plaintiff];
- 2) the actions of [defendant] were a responsible cause of [plaintiff]’s alleged injuries and damages; [and]
- 3) [(defendant) acted under color of law].

Comments

The instructions in this subchapter (Instruction Nos. 1201–1215) apply to cases of non-incarceration excessive force, including during an arrest. They also apply to cases of excessive force during incarceration or pretrial detention. For post-conviction incarceration, see 7TH CIRCUIT PATTERN CIVIL INSTRUCTION No. 7.18 (2017), available at http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf.

A pretrial detainee is an incarcerated person who is accused, but has not yet been convicted. A pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable to prevail on an excessive force claim. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2474 (2015).

42 U.S.C. § 1983 provides a civil remedy against a person who, under color of state law, subjects a United States citizen to the deprivation of any rights, privileges, or immunities secured by the federal Constitution or federal laws. *Wells v. Bernitt*, 936 N.E.2d 1242, 1250 (Ind. Ct. App. 2010), citing *City of Warsaw v. Orban*, 884 N.E.2d 262, 267 (Ind. Ct. App. 2007). In order to recover under § 1983 for excessive force, defendant had to show that: (1) he held a constitutionally protected right, (2) he was deprived of this right, (3) the arresting officers acted with reckless indifference to cause this deprivation, and (4) the arresting officers acted under color of state law. *Wells*, 936 N.E.2d at 1250.

The Supreme Court held that nominal damages are available for the denial of a constitutional right event absent actual injury. *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

The third element in the instruction, under color of law, should be included only when there is a question on the issue for the jury.

An objective reasonableness standard applies to claims of excessive force during an arrest in violation of the Fourth Amendment. *Erwin v. County of Manitowoc*, 872 F.2d 1292, 1295 (7th Cir. 1989). “The objective reasonableness standard demands that a trier of fact weigh the totality of the facts and circumstances known to an officer at the time of his actions in determining whether those actions were objectively reasonable.” *Id.*

1202 Excessive Force—Non-Incarcerated Plaintiff and Pretrial Detainee Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Color of Law—Definition

- (A) **Public Employee Defendant**—[*Defendant*], who is employed by [government entity], acted under color of law, if [defendant] used or misused authority that [defendant] has because of [defendant]’s official position as a [job title (i.e. police officer)]. [*Defendant*] may act under color of law even if [defendant] is violating a [state][local] law or policy.

[You may find [defendant] acted under color of law even if [defendant] was acting outside [defendant’s] authority as a [job title] if [defendant] represented [himself][herself] as having that authority, or if [defendant] otherwise used [defendant]’s official position as a [job title] to accomplish the act.]

- (B) **Private Party Defendant**—[*Defendant*] acted under color of law if [he][she] and [government employee] reached an understanding to [describe alleged conduct] and that [defendant] knowingly participated in the joint activity with [government employee].

Comments

See 7TH CIRCUIT PATTERN CIVIL INSTRUCTION No. 7.03 (2017), available at http://www.ca7.uscourts.gov/Pattern-Jury-instructions/7th_cir_civil_instructions.pdf. The instruction includes language that may be used whether the defendant is a government employee or a private party. If the color of law requirement is undisputed, this instruction should be eliminated.

This instruction does not address the issue of scope of employment, which is a matter of state law and will need to be addressed separately if it is disputed.

Public Employee Defendant: An action by a public employee defendant is taken “under color of state law” if it involves a “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *Estate of Sims v. County of Bureau*, 506 F.3d 509, 515–516 (7th Cir. 2007). The inquiry “turn[s] largely on the nature of the specific acts the policy officer performed” and may also involve whether the officer expressly or implicitly invoked his government authority when committing the alleged violation. *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118–19 (7th Cir. 1995) (off-duty officer working as private security acted under color of law because he was wearing police uniform when he arrested patron).

Private party acting with public official: Instruction (B) is intended for cases in which the plaintiff contends a private party acted under color of law by acting jointly with a government actor/entity. A plaintiff must show that (1) a state official and a private individual reached an understanding to deprive the plaintiff of his constitutional rights, and (2) the private individual was a willful participant in joint activity with the state official. *Lewis v. Mills*, 677 F.3d 324, 333 (7th Cir. 2012).

See also, *K.M.K. v. A.K.*, 908 N.E.2d 658, 662 (Ind. Ct. App. 2009).

1203 Excessive Force—Non-Incarcerated Plaintiff and Pretrial Detainee Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Scope of Force

Not all force used by an officer is unreasonable. Some force may be necessary. [Plaintiff] may only recover for excessive force if the force used was greater than the force that a reasonable officer in the same position would use.

Comments

Any claim that excessive force was used by a police officer when making an arrest is analyzed under the reasonableness standard of the Fourth Amendment to the United States Constitution. *Shoultz v. State*, 735 N.E.2d 818, 823–24 (Ind. Ct. App. 2000):

Claims that law enforcement officers have used excessive force in the course of an arrest of a free citizen are analyzed under the Fourth Amendment to the United States Constitution and its “reasonableness” standard. *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443 (1989). Because the Fourth Amendment test of reasonableness is not capable of precise definition or mechanical application, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. 490 U.S. at 396, 109 S. Ct. at 1872. The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Id.* However, the “reasonableness” inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. 490 U.S. at 396–97, 109 S. Ct. at 1872.

The Committee does not believe that Ind. Code § 35-41-3-3, the criminal statute on use of force relating to arrest or escape, applies to § 1983 claims.

1205 Excessive Force—Non-Incarcerated Plaintiff and Pretrial Detainee Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Reasonableness of Force

Physical bodily injury is not required to prove that the force was unreasonable, nor does physical bodily injury automatically make the force unreasonable. You must decide whether the force was unreasonable.

In deciding whether force was reasonable or unreasonable, you may consider all of the circumstances, including:

- 1) the need for the use of force;
- 2) the relationship between the need for force and the amount of force [defendant] used;
- 3) any efforts made by [defendant] to limit the force to what was needed under the circumstances;
- 4) what a reasonable officer may have perceived as a threat under the same or similar circumstances;
- 5) whether [plaintiff] poses an immediate threat to the safety of officers or others;
- 6) the [law enforcement agency]'s standard operating procedures regarding the use of force;
- 7) the extent to which [plaintiff] was actively resisting arrest or refusing reasonable orders of the authorities;
- 8) the extent of [plaintiff]'s injuries, if any;
- 9) [the severity of the alleged crime]; and
- 10) [any other circumstances based on the facts of the case];
- 11) the severity of the security problem at issue.

Comments

These factors are simply a starting off point and can be modified to fit the specific circumstances of the case.

The factors listed in *Burton v. State*, 978 N.E.2d 520, 525–526 (Ind. Ct. App. 2012) are as follows:

When considering whether police force is unreasonable, courts consider various factors including, “the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others”; and whether the suspect “is actively resisting arrest or attempting to evade arrest by flight.” *Id.* at 824. The “reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Id.* (citing *Graham*, 490 U.S. at 396). However, “‘the reasonableness inquiry’ in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstance confronting them,

without regard to their underlying intent or motivation.” *Id.* (citing *Graham*, 490 U.S. at 396–97).

In *Shoultz v. State*, 735 N.E.2d 818, 824–825 (Ind. Ct. App. 2000), the court reviewed the following factors:

Here, consideration of the *Graham* factors compels the conclusion that the force Officer Mayhew used against Shoultz was objectively unreasonable and unconstitutionally excessive. First, although Shoultz was loud and argumentative, Mayhew himself testified that Shoultz never threatened him with any force or violence. Also, no other persons were being argumentative and uncooperative with Mayhew at the Grim Reaper club, which might have legitimately increased Mayhew’s apprehension. Rather, the motorcyclist who was being investigated for an unsafe start was cooperating with Mayhew and was attempting to get Shoultz to cooperate; another motorcyclist had originally been outside but went in the clubhouse on Mayhew’s order and no one else was outside. Second, there is no evidence that Shoultz or anyone else ever touched Mayhew before Mayhew used the pepper spray and flashlight to subdue Shoultz. There is also no evidence in the record that Shoultz made any threatening gestures toward Mayhew. Third, it appears from the record that Mayhew never informed Shoultz that he was going to be arrested before Mayhew began using force against Shoultz. Mayhew testified that he could not remember advising Shoultz that he was being placed under arrest; Shoultz and the other motorcyclist, the only other witnesses to these events, testified that Mayhew had not informed Shoultz that he was under arrest. Fourth, Mayhew had not attempted to handcuff Shoultz before he began using force. Fifth, the purported crime for which Mayhew was attempting to arrest Shoultz was resisting law enforcement, a class A misdemeanor. Although we do not derogate the seriousness of such an offense, we note that it is not a felony, and under the circumstances present here there was no basis for concluding Shoultz had committed a crime at that point. We also find it relevant that Mayhew was attempting to arrest Shoultz because of his interference in Mayhew’s investigation of the other motorcyclist’s alleged unsafe start, a class C infraction under Indiana law. Ind. Code §§ 9-21-8-23 and 9-21-8-49.

Finally, we believe it is appropriate to consider the sound guidelines for the use of force set forth by Mayhew’s employer, the Evansville Police Department, in determining whether the amount of force he used against Shoultz was objectively reasonable. See *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995) (holding that although police department guidelines do not create a constitutional right, they are relevant to the analysis of unconstitutionally excessive force). The Department’s Standard Operating Procedures state that “use of nonlethal force by an officer is permitted in situations where the officer is attacked or resisted by someone using nonlethal force Only that amount of force necessary to overcome an attack or physical resistance will be used.” Record p. 130-J. Furthermore, “all officers will avoid blows to the head unless absolutely necessary. A metal flashlight or any similar device will not be used as a nightstick except when absolutely necessary.” Record p. 130-N. Here, at no time prior to

Mayhew's use of force did Shoultz forcibly resist Mayhew in any way and thus there is no justification under the guidelines for the force Mayhew used against Shoultz. Moreover, we cannot conclude that it was "absolutely necessary" to strike Shoultz in the head with a large metal flashlight in the absence of any kind of actual or threatened physical attack upon Mayhew.

After Shoultz was knocked to the ground, he thrashed about and at some point kicked Mayhew once in the shin. There is no evidence that this kick caused any bodily injury. Shoultz' resistance at this point appears under the circumstances to have been not out of proportion to the force used against him moments before. We believe excessive force was used against a person who never verbally or physically threatened Mayhew with harm, who was not forcibly resisting law enforcement or attempting to escape, who was being arrested (though this was not verbalized by Mayhew) for interfering with the investigation of a class C infraction. There is insufficient evidence that Mayhew was lawfully engaged in the performance of his duties because he used excessive force against Shoultz. Because Shoultz' response to that force was reasonable, his conviction for resisting law enforcement is reversed.

See also 7TH CIRCUIT PATTERN CIVIL INSTRUCTION No. 7.09 and 7.10 (2017), available at http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf (combining the factors found in this instruction and the "knowledge" element found in the next instruction).

1207 Excessive Force—Non-Incarcerated Plaintiff and Pretrial Detainee Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Two or More Defendants

There are [two][number greater than two] defendants in this action. [The claims against them will be tried together for efficiency.] You must consider the claims against and any defenses raised by each defendant separately. Unless I instruct you otherwise, my instructions apply to [both][all] defendants.

Comments

This instruction, also found at Instruction No. 541, will eliminate the need to give separate and repetitious instructions on behalf of each defendant where there are similar issues.

The Indiana Rules of Procedure Trial Rules envision a number of situations in which a single lawsuit may involve two or more defendants. Under T.R. 20(A)(2):

All persons may be joined in one [1] action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of, or arising out of, the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Indiana Trial Rule 19(A) establishes two tests for determining whether a person is an indispensable party to a lawsuit. The failure to name a party who meets one of the tests set forth by T.R. 19(A) permits the court to order that he or she be added as a party if the person is subject to process, or that the action be dismissed if the person is not, or that the action be allowed to continue in the person's absence. In the exercise of this discretion, the court is required to consider the four factors enumerated in T.R. 19(B).

Persons having claims against the plaintiff in a lawsuit may be joined as defendants and required to interplead when the plaintiff is or may be exposed to double or multiple liability. T.R. 22.

**1209 Excessive Force—Non-Incarcerated Plaintiff and Pretrial Detainee
Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Failure to Intervene**

An officer who does not use excessive force, but had a reasonable opportunity to intervene to prevent, stop, or reduce the use of excessive force, may be liable to [plaintiff] for failing to intervene. In determining this, you may consider whether that officer had the knowledge, ability, opportunity, and authority to intervene but did not take reasonable steps to intervene.

To succeed on a claim for failure to intervene to protect [plaintiff] from excessive force allegedly used by [defendant], [plaintiff] must prove by the greater weight of the evidence that:

- 1) [defendant] used excessive force against [plaintiff];
- 2) [bystander-defendant] knew that [defendant] was using or was about to use excessive force on [plaintiff];
- 3) [bystander-defendant] had a realistic opportunity to do something to prevent, stop, or reduce the use of excessive force;
- 4) [bystander-defendant] failed to take reasonable steps to prevent, stop, or reduce the use of excessive force; and
- 5) [bystander-defendant]'s failure was a responsible cause of [plaintiff]'s injury or damages.

Comments

A reasonable opportunity to intervene occurs when officers are capable of calling for backup, calling for help, or at a minimum, telling the offending officer to stop. *Abdullahi v. City of Madison*, 423 F.3d 763, 774 (7th Cir. 2005).

“[A]n officer who is present and fails to intervene to prevent other law enforcement officers from infringing the constitutional rights of citizens is liable under § 1983 if that officer had reason to know: (1) that excessive force was being used, (2) that a citizen has been unjustifiably arrested, or (3) that any constitutional violation has been committed by a law enforcement official; *and* the officer had a realistic opportunity to intervene to prevent the harm from occurring.” *Id.* at 285.

Id. citing *Yang v. Hardin*, 37 F.3d 282 (7th Cir. 1994). In determining whether the officers failed to intervene, courts may consider these nonexclusive factors: the amount of time the excessive force lasted, the number of blows the offending officer inflicted, and the proximity of the other officers to the excessive force. *Kirkwood v. DeLong*, 683 F. Supp. 2d 823, 830 (N. D. Ind. 2010); *see also Howard v. Ealing*, 876 F. Supp. 2d 1056, 1072 (N.D. Ind. 2012) (declining to hold the nearby officers liable under the bystander theory of liability because the offending officer's act of throwing the suspect against the van occurred in quick succession so the officers had no realistic opportunity to intervene).

See also 7TH CIRCUIT PATTERN CIVIL INSTRUCTION No. 7.22 (2017), available at http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf.

1211 Excessive Force—Non-Incarcerated Plaintiff and Pretrial Detainee Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Reasonable Officer, Timing, Intent

Decide whether [*defendant*]'s actions were unreasonable by considering what a reasonable officer would have done at the time, and in the circumstances, when [*defendant*] used the force.

Do not consider [*defendant*]'s intent or motive.

Comments

This instruction should be given when information discovered after the use of excessive force casts a different light on the officer's use of force.

In *Brooks v. Anderson Police Dep't*, 975 N.E.2d 395, 399 (Ind. Ct. App. 2012), the Court of Appeals stated:

Because the Fourth Amendment reasonableness standard does not lend itself to a precise definition or mechanical application, the facts and circumstances of each individual case require careful attention. *Shoultz v. State*, 735 N.E.2d 818, 824 (Ind. Ct. App. 2000). The reasonableness standard in an excessive force case is objective: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them" on the scene, rather than with the benefit of 20/20 hindsight. *Shoultz*, 735 N.E.2d at 824.

**1213 Excessive Force—Non-Incarcerated Plaintiff and Pretrial Detainee
Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Compensatory
Damages**

[Use appropriate elements from Instruction No. 703 for Compensatory Damages.]

Comments

See the 700 series for other damages instruction.

**1215 Excessive Force—Non-Incarcerated Plaintiff and Pretrial Detainee
Plaintiff—42 U.S.C. § 1983 and 4th Amendment—Punitive Damages**

[Use the punitive damages instructions found in Instruction Nos. 737–745.]

Comments

If a punitive damages instruction is given, a compensatory damages instruction must also be given. *See* Instruction No. 703.

See Ind. Code 34-51-3-2; *Kellogg v. Gary*, 562 N.E.2d 685, 711 (Ind. 1990); *Stanley v. Irsa*, 2011 U.S. Dist. LEXIS 43051 (N.D. Ind. 2011).

B. 8th Amendment—Excessive Force**1221 Excessive Force—Convicted Incarcerated Plaintiff—8th Amendment—Elements**

To succeed on his claim of excessive force, [plaintiff] must prove each of the following by the greater weight of the evidence:

- 1) [defendant] used force on [plaintiff];
- 2) [defendant] intentionally used extreme or excessive cruelty toward [plaintiff] for the purpose of harming him, and not in a good faith effort to maintain or restore security or discipline;
- 3) [defendant]'s conduct caused harm to [plaintiff]; and
- 4) [defendant] acted under color or law.

Comments

A subjective standard applies to claims of excessive force for convicted incarcerated plaintiffs. The subjective includes consideration of the officer's reasonable perception of any threat posed by the plaintiff. *Hendrickson v. Cooper*, 589 F.3d 887 (7th Cir. 2009).

See also 7TH CIRCUIT PATTERN CIVIL INSTRUCTION No. 7.18 (2017), available at http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf.

1222 Excessive Force—Convicted Incarcerated Plaintiff—8th Amendment—Color of Law—Definition

- (C) **Public Employee Defendant**—[*Defendant*], who is employed by [government entity], acted under color of law, if [defendant] used or misused authority that [defendant] has because of [defendant]’s official position as a [job title (i.e. police officer)]. [*Defendant*] may act under color of law even if [defendant] is violating a [state][local] law or policy.

[You may find [defendant] acted under color of law even if [defendant] was acting outside [defendant’s] authority as a [job title] if [defendant] represented [himself][herself] as having that authority, or if [defendant] otherwise used [defendant]’s official position as a [job title] to accomplish the act.]

- (D) **Private Party Defendant**—[*Defendant*] acted under color of law if [he][she] and [government employee] reached an understanding to [describe alleged conduct] and that [defendant] knowingly participated in the joint activity with [government employee].

Comments

See 7TH CIRCUIT PATTERN CIVIL INSTRUCTION No. 7.03 (2017), available at http://www.ca7.uscourts.gov/Pattern-Jury-instructions/7th_cir_civil_instructions.pdf. The instruction includes language that may be used whether the defendant is a government employee or a private party. If the color of law requirement is undisputed, this instruction should be eliminated.

This instruction does not address the issue of scope of employment, which is a matter of state law and will need to be addressed separately if it is disputed.

Public Employee Defendant: An action by a public employee defendant is taken “under color of state law” if it involves a “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” *Estate of Sims v. County of Bureau*, 506 F.3d 509, 515–516 (7th Cir. 2007). The inquiry “turn[s] largely on the nature of the specific acts the policy officer performed” and may also involve whether the officer expressly or implicitly invoked his government authority when committing the alleged violation. *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118–19 (7th Cir. 1995) (off-duty officer working as private security acted under color of law because he was wearing police uniform when he arrested patron).

Private party acting with public official: Instruction (B) is intended for cases in which the plaintiff contends a private party acted under color of law by acting jointly with a government actor/entity. A plaintiff must show that (1) a state official and a private individual reached an understanding to deprive the plaintiff of his constitutional rights, and (2) the private individual was a willful participant in joint activity with the state official. *Lewis v. Mills*, 677 F.3d 324, 333 (7th Cir. 2012).

See also, *K.M.K. v. A.K.*, 908 N.E.2d 658, 662 (Ind. Ct. App. 2009).

1223 Excessive Force—Convicted Incarcerated Plaintiff—8th Amendment—Scope of Force—Subjective Standard

Not all force used by an officer is unreasonable.

[*Plaintiff*] may only recover for excessive force if [*plaintiff*] proves by the greater weight of the evidence that [*defendant*] intentionally, knowingly, and maliciously used extreme or excessive harm to [*plaintiff*].

Comments

A subjective standard applies to claims of excessive force for convicted incarcerated plaintiffs. The subjective includes consideration of the officer's reasonable perception of any threat posed by the plaintiff. *Hendrickson v. Cooper*, 589 F.3d 887 (7th Cir. 2009).

See also 7TH CIRCUIT PATTERN CIVIL INSTRUCTION No. 7.18 (2017), available at http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf.

See also *Kingsley v. Hendrickson*, 744 F.3d 443 (7th Cir. 2014).

1225 Excessive Force—Convicted Incarcerated Plaintiff—8th Amendment—Reasonableness of Force

In deciding whether [*plaintiff*] has proved that [*defendant*] intentionally used extreme or excessive cruelty toward [*plaintiff*], you may consider the following:

- 1) the need to use force;
- 2) the relationship between the need to use force and the amount of force used;
- 3) the extent of [*plaintiff*]'s injuries;
- 4) whether [*defendant*] reasonably believed there was a threat to the safety of staff or prisoners;
- 5) any efforts made by [*defendant*] to limit the amount of force used.

Comments

See also 7TH CIRCUIT PATTERN CIVIL INSTRUCTION No. 7.18 (2017), available at http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf.

**1227 Excessive Force—Convicted Incarcerated Plaintiff—8th
Amendment—Two or More Defendants**

There are [two][*number greater than two*] defendants in this action. [The claims against them will be tried together for efficiency.] You must consider the claims against and any defenses raised by each defendant separately. Unless I instruct you otherwise, my instructions apply to [both][all] defendants.

Comments

This Instruction, also found at Instruction No. 541, will eliminate the need to give separate and repetitious instructions on behalf of each defendant where there are similar issues.

The Indiana Rules of Procedure Trial Rules envision a number of situations in which a single lawsuit may involve two or more defendants. Under T.R. 20(A)(2):

All persons may be joined in one [1] action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of, or arising out of, the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Indiana Trial Rule 19(A) establishes two tests for determining whether a person is an indispensable party to a lawsuit. The failure to name a party who meets one of the tests set forth by T.R. 19(A) permits the court to order that he or she be added as a party if the person is subject to process, or that the action be dismissed if the person is not, or that the action be allowed to continue in the person's absence. In the exercise of this discretion, the court is required to consider the four factors enumerated in T.R. 19(B).

Persons having claims against the plaintiff in a lawsuit may be joined as defendants and required to interplead when the plaintiff is or may be exposed to double or multiple liability. T.R. 22.

1229 Excessive Force—Convicted Incarcerated Plaintiff—8th Amendment—Failure to Intervene

An officer who does not use excessive force, but had a reasonable opportunity to intervene to prevent, stop, or reduce the use of excessive force, may be liable to a plaintiff for failing to intervene. In determining this, you may consider whether that officer had the knowledge, ability, opportunity, and authority to intervene but did not take reasonable steps to intervene.

To succeed on a claim for failure to intervene to protect [plaintiff] from excessive force allegedly used by [defendant], [plaintiff] must prove by the greater weight of the evidence that:

- 1) [defendant] used excessive force against [plaintiff];
- 2) [bystander-defendant] knew that [defendant] was using or was about to use excessive force on [plaintiff];
- 3) [bystander-defendant] had a realistic opportunity to do something to prevent, stop, or reduce the use of excessive force;
- 4) [bystander-defendant] failed to take reasonable steps to prevent, stop, or reduce the use of excessive force; and
- 5) [bystander-defendant]'s failure was a responsible cause of [plaintiff]'s injury or damages.

Comments

A reasonable opportunity to intervene occurs when officers are capable of calling for backup, calling for help, or at a minimum, telling the offending officer to stop. *Abdullahi v. City of Madison*, 423 F.3d 763, 774 (7th Cir. 2005).

“[A]n officer who is present and fails to intervene to prevent other law enforcement officers from infringing the constitutional rights of citizens is liable under § 1983 if that officer had reason to know: (1) that excessive force was being used, (2) that a citizen has been unjustifiably arrested, or (3) that any constitutional violation has been committed by a law enforcement official; *and* the officer had a realistic opportunity to intervene to prevent the harm from occurring.” *Id.* at 285.

Id. citing *Yang v. Hardin*, 37 F.3d 282 (7th Cir. 1994).

In determining whether the officers failed to intervene, courts may consider these nonexclusive factors: the amount of time the excessive force lasted, the number of blows the offending officer inflicted, and the proximity of the other officers to the excessive force. *Kirkwood v. DeLong*, 683 F. Supp. 2d 823, 830 (N. D. Ind. 2010); *see also Howard v. Ealing*, 876 F. Supp. 2d 1056 (N.D. Ind. 2012) (declining to hold the nearby officers liable under the bystander theory of liability because the offending officer's act of throwing the suspect against the van occurred in quick succession so that the officers had no realistic opportunity to intervene).

See also 7TH CIRCUIT PATTERN CIVIL INSTRUCTION No. 7.16 (2017), available at http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_cir_civil_instructions.pdf.

**1231 Excessive Force—Convicted Incarcerated Plaintiff—8th
Amendment—Intent of Officer—Subjective**

Decide whether [*defendant*]'s actions were unreasonable by considering the threat reasonably perceived by [*defendant*].

You may consider [*defendant*]'s intent or motive.

Comments

See comments to Instructions 1221–1225.

**1233 Excessive Force—Convicted Incarcerated Plaintiff—8th
Amendment—Compensatory Damages**

[Use appropriate elements from Instruction No. 703 for Compensatory Damages.]

Comments

See the 700 series for other damages instruction.

**1235 Excessive Force—Convicted Incarcerated Plaintiff—8th
Amendment—Punitive Damages**

[Use the punitive damages instructions found in Instruction Nos. 737–745.]

Comments

If a punitive damages instruction is given, a compensatory damages instruction must also be given. *See* Instruction No. 703.

See Ind. Code 34-51-3-2; *Kellogg v. Gary*, 562 N.E.2d 685, 711 (Ind. 1990); *Stanley v. Irsa*, 2011 U.S. Dist. LEXIS 43051 (N.D. Ind. 2011).

CHAPTER 1300

MOTOR VEHICLES/CARRIER OF PASSENGERS

SYNOPSIS

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Introduction

While most of the subject matter chapters (Series 900-3900) are complete sets of instructions with issues for trial, burden of proof, definitions, etc., this chapter is a miscellaneous collection of instructions that can be used with comparative fault and common law negligence cases.

A. Motor Vehicles

1301 Duty of Driver and/or Pedestrian to be Careful

Every [motor vehicle driver][and][pedestrian] must use the care an ordinarily careful person would use under the same or similar circumstances. [Drivers][and][Pedestrians] who do not use reasonable care are negligent.

Comments

This instruction covers the common law rule as to negligence of a driver. Indiana Code § 9-13-2-47 defines a driver as a person who drives or is in actual physical control of a vehicle. A pedestrian has a corresponding duty to use reasonable care for his own safety and has no right to heedlessly cross a street. *Nesvig v. Town of Porter*, 668 N.E.2d 1276, 1281 (Ind. Ct. App. 1996).

This instruction may be given with an instruction on a specific motorist or pedestrian standard of care established by statute in the form suggested in Instruction No. 937 (comparative fault) or 1139 (common law negligence).

The legislature has not codified every aspect of motor vehicle operation that is required for a driver to exercise due care. The general duty of due care applies even when a party complies with the statutory rules of the road. *Beem v. Steel*, 140 Ind. App. 512, 224 N.E.2d 61 (1967). Also, a jury may decide that the violation of a statute should be excused or that the violation was not a proximate cause of the injury. See Instruction No. 937 cmt. (comparative fault) or 1139 cmt. (common law negligence).

Other non-codified common law duties still require instructions. See, e.g., Instruction No. 1303 (proper lookout). The Committee has not recommended instructions that cover all such non-statutory incidents of a driver's duty. In tailoring instructions to the allegations and evidence in each case, a trial judge should be careful not to draft its instructions as to suggest to the jury that the duty of reasonable care is either constricted or expanded beyond its proper scope. Compare *Jackman v. Montgomery*, 162 Ind. App. 558, 320 N.E.2d 770 (1974) (trial court erred in failing to give tendered "lookout" instruction that imposed duty to observe not only traveled portion of highway but also "along the highway") with *Thornton v. Pender*, 268 Ind. 540, 377 N.E.2d 613 (1978) (tendered instruction properly rejected because it would have improperly imposed a duty not just to maintain a lookout but also to "discover" bicycles entering a highway, whether they were clearly visible or not).

The Guest Statute, Ind. Code ch. 34-30-11, prohibits recovery by passengers who are immediate family or hitchhikers, absent wanton or willful misconduct. Because it is silent as to other guests, the common law duty to use reasonable care stated in *Munson v. Rupker*, 96 Ind. App. 15, 148 N.E. 169 (1925), applies to passengers not delineated in the guest statute. *Stephenson v. Ledbetter*, 596 N.E.2d 1369 (Ind. 1992). That common law duty does not, however, make the driver solely responsible for a passenger's safety and does not excuse passengers from their duty to use care for their own safety. *Stephenson*, 596 N.E.2d at 1372.

1303 Proper Lookout

Every [driver][pedestrian] must maintain a proper lookout to see or hear what should be seen or heard through the exercise of reasonable care. A person is negligent if [he][she] does not maintain a proper lookout.

Comments

Case law has frequently addressed a driver's duty to keep a proper lookout, which the Indiana Supreme Court has defined as "the duty to see that which is clearly visible or which in the exercise of due care would be visible." *Thornton v. Pender*, 268 Ind. 540, 544, 377 N.E.2d 613, 617 (1978), *quoted in St. John Town Board v. Lambert*, 725 N.E.2d 507, 516 (Ind. Ct. App. 2000). Statutes do not provide for a duty to maintain a lookout, yet as *St. John Town Board* suggests, perhaps that duty has become so fixed as a general obligation to use due care that the duty to maintain a proper lookout may require an instruction.

A pedestrian has a corresponding duty to use reasonable care for his own safety and has no right to heedlessly cross a street. *Nesvig v. Town of Porter*, 668 N.E.2d 1276, 1281 (Ind. Ct. App. 1996).

A judge should be careful not to constrict or expand the lookout duty beyond its proper scope. Compare *Jackman v. Montgomery*, 162 Ind. App. 558, 320 N.E.2d 770 (1974) trial court erred in failing to give tendered "lookout" instruction that imposed duty to observe not only traveled portion of highway but also "along the highway") with *Thornton v. Pender*, 268 Ind. 540, 377 N.E.2d 613 (1978) (tendered instruction properly rejected because it would have improperly imposed a duty not just to maintain a lookout but also to "discover" bicycles entering a highway, whether they were clearly visible or not).

1305 Passenger's Duty of Care

A passenger in a motor vehicle is not required to constantly look out for unexpected danger, but still must use reasonable care for [his][her] own safety. A passenger is required to use that degree of care for [his][her] own safety that a reasonably careful person would use in the same situation.

Comments

Generally, an occupant of a vehicle is not required to be constantly on the lookout for unexpected danger. *Spratt v. Alsup*, 468 N.E.2d 1059, 1063 (Ind. Ct. App. 1984). However, a passenger has some duty to maintain a proper lookout, which is to say, a passenger remains under a duty to use reasonable care. *Kavanagh v. Butorac*, 140 Ind. App. 139, 148, 221 N.E.2d 824, 829 (1966). Moreover, a passenger is required to use reasonable care for his own safety and will be barred from recovery if he voluntarily rides with a driver he knows to be intoxicated, reckless, or incompetent, or if he unreasonably fails to warn the driver of danger that he discovers, or in the exercise of reasonable care should discover. *Goodhart v. Board of Comm'rs of County of Parke*, 533 N.E.2d 605, 610 (Ind. Ct. App. 1989). A passenger is required to use the degree of care for his own safety that an ordinarily prudent person in like circumstances would use. *Goodhart*, 533 N.E.2d at 610. An occupant may have a duty to warn the driver of a danger of which the occupant is aware. *Goodhart*, 533 N.E.2d at 610. Nevertheless, an occupant may ordinarily rely on the assumption that the driver will exercise ordinary care and caution and need not generally keep a lookout for approaching danger. *St. John Town Bd. v. Lambert*, 725 N.E.2d 507, 519 (Ind. Ct. App. 2000).

If a passenger, in the exercise of reasonable care, saw or should have seen an approaching car and had enough time to warn the driver of the vehicle in which he was riding in time so that that driver exercising due care could have prevented the collision, the passenger has a duty to so warn the driver. *Burton v. Bridwell*, 938 N.E.2d 1 (Ind. Ct. App. 2010); *Kavanagh v. Butorac*, 221 N.E.2d 824, 829 (Ind. Ct. App. 1966).

Absent agency, joint venture, right of control, or unity of interest, the fault of the driver of a vehicle may not be imputed to the passenger. *Handrow v. Cox*, 575 N.E.2d 611, 614 (Ind. 1991). Generally, evidence of a passenger's failure to use a seatbelt is not admissible. *See City of Fort Wayne v. Parrish*, 32 N.E.3d 275 (Ind. Ct. App. 2015); Ind. Code § 9-19-10-7.

1307 Assumption Others Will Use Due Care

A person who is lawfully using a road is entitled to assume that others using the road will use reasonable care.

Comments

It is well settled that one who is lawfully using a public highway, in the absence of knowledge to the contrary, has the right to assume that others using it in common with him will use ordinary care to avoid injuring him, nor is such motorist bound to anticipate and safeguard against violation of statutory law or negligent operation by other motorists upon the highway. *Stull v. Davidson*, 125 Ind. App. 565, 577-578, 127 N.E.2d 130 (1955); *see also, Prange v. Martin*, 629 N.E.2d 915, 917-18 (Ind. Ct. App. 1994).

1309 Automobile Guest (Relatives and Hitchhikers)—Liability

The owner or driver of a motor vehicle is responsible for loss or damage arising from injuries to a guest passenger only if the injuries are caused by the wanton or willful misconduct of the owner or driver.

If [defendant] has proved by the greater weight of the evidence that:

(1) [plaintiff] was a passenger in [(defendant)'s motor vehicle][a motor vehicle driven by (defendant)]; and

(2) [plaintiff] did not pay [defendant] to transport [him][her],

then [defendant] is responsible only if [plaintiff] proves all of the following:

(3) [defendant]'s behavior was wanton or willful;

(4) [plaintiff] was injured while traveling in the motor vehicle;

(5) [plaintiff] suffered [loss][damage] as a result of [his][her] injur[y][ies]; and

(6) [defendant]'s behavior caused [plaintiff]'s [loss][damage].

Comments

Indiana Code ch. 34-30-11, the Guest Statute, provides that an operator or owner of a motor vehicle shall not be liable for injuries to specifically defined gratuitous passengers (specified family members or hitchhikers) unless such injuries are caused by the wanton or willful misconduct of the operator or owner. Evidence that a driver was intoxicated is sufficient to show wanton or willful misconduct within the meaning of the Guest Statute. *Williams v. Crist*, 484 N.E.2d 576 (Ind. 1985); *but see Wohlwend v. Edwards*, 796 N.E.2d 781 (Ind. Ct. App. 2003).

When it is an issue whether the passenger was a child of the owner or operator or was a hitchhiker, this instruction should be modified to permit the jury to decide the question. The definitions of these terms appear in Ind. Code § 34-6-2-21(b) (child); Ind. Code § 34-6-2-57 (hitchhiker); Ind. Code § 34-6-2-142 (stepchild).

A judge giving this instruction should also instruct on willful or wanton misconduct, Instruction No. 913 (comparative fault) or Instruction No. 1111 (common law negligence).

Airplane guests are subject to the Airplane Guest Statute, similar to the automobile statute. Ind. Code § 8-21-5-1.

1311 Joint Enterprise—Defined

A “joint enterprise” is an activity between two or more persons for their mutual benefit. To establish that a joint enterprise existed between the parties in this case, you must decide that the parties had:

- (1) joint control over the management, operation, course, and conduct of their activity;
- (2) a joint financial interest in their activity;
- (3) an equal right to direct and govern each other’s movements; and
- (4) an express or implied agreement regarding the activity.

If you decide that _____ and _____ were engaged in a joint enterprise, any [contributory] fault by _____ is also [contributory] fault by _____.

Comments

To establish a joint enterprise in motor vehicle cases, the proponent must show: (1) joint control over the management and operation of the vehicle and over the course and conduct of the trip, (2) an equal right to direct and govern the movement and conduct of each other, (3) a community of interest in the object and purpose of the undertaking that is pecuniary in nature, and (4) an express or implied agreement. *See Benson v. Sorrell*, 627 N.E.2d 866 (Ind. Ct. App. 1994); *McKinney v. Public Serv. Co.* 597 N.E.2d 1001, 1009 (Ind. Ct. App. 1992); *Grinter v. Haag*, 168 Ind. App. 595, 344 N.E.2d 320 (1976); *Ackman v. Bullard*, 161 Ind. App. 437, 316 N.E.2d 444 (1974); *Leuck v. Goetz*, 151 Ind. App. 528, 280 N.E.2d 847 (1972); *Hake v. Moorhead*, 140 Ind. App. 127, 222 N.E.2d 617 (1966); *New York C. R. Co. v. Sarich*, 133 Ind. App. 516, 180 N.E.2d 388 (1962); *Lee Bros., Inc. v. Jones*, 114 Ind. App. 688, 711, 54 N.E.2d 108, 117 (1944).

1313 Duty of Driver of Emergency Vehicle

The driver of an emergency vehicle must drive with due regard for the safety of all persons using the highway.

[For other statutory issues regarding drivers of emergency vehicles, the Committee recommends the use of Instruction No. 937 (comparative fault) or 1139 (common law negligence).]

Comments

An authorized emergency vehicle is defined by Ind. Code § 9-13-2-6. The term includes fire or police department vehicles, ambulances, hospital emergency vehicles, vehicles designated by the Indiana department of transportation under Ind. Code § 9-21-20-1, vehicles approved by the Indiana emergency medical services commission, and certain vehicles of the department of correction. A person driving an authorized emergency vehicle has some exemptions from the operation of traffic laws. *See* Ind. Code §§ 9-21-1-8, 9-21-8-35. The statutes do not, however, relieve the driver of an emergency vehicle of the duty to drive with due regard for the safety of persons using the streets; the driver must use the care as an ordinarily prudent person would use under the circumstances. *Belding v. Town of New Whiteland*, 622 N.E.2d 1291 (Ind. 1993); *Gaines v. Taylor*, 96 Ind. App. 378, 185 N.E. 297 (1933); *see also* Ind. Code § 9-21-8-35(d); Ind. Code § 9-21-1-8(d).

If it is alleged that more than one party violated a statute, the Committee recommends giving two instructions—one setting out the statute applicable to plaintiff's case and the other applicable to defendant's case.

1315 Duty of Others Upon Approach of Emergency Vehicle

Unless otherwise directed by a law enforcement officer, a driver who hears the siren of an emergency vehicle or sees an emergency vehicle approaching with flashing lights must:

- (1) yield the right of way to the emergency vehicle;
- (2) drive immediately to the right hand edge or curb of the highway, position [his][her] vehicle clear of any intersection and parallel to the right side of the road, and stop; and
- (3) remain stopped and in parallel position until the emergency vehicle has passed.

Comments

This instruction paraphrases Ind. Code § 9-21-8-35 and applies to authorized emergency vehicles as defined by Ind. Code § 9-13-2-6.

1317 Emergency Call

One of the questions in this case is whether [*name of person or party*] was driving to an emergency.

The special rules for drivers of emergency vehicles apply only if the [*name of person or party*] had reasonable grounds to believe that:

- (1) an emergency was taking place; and
- (2) [he][she] had a duty to respond to the emergency.

Otherwise, [*name of person or party*] must follow the same rules as any other driver.

Comments

A judge should give this instruction only if he or she also gives Instruction No. 1313 stating the statutory privileges given to the driver of an emergency vehicle, and only if there is an issue about whether the vehicle was on an emergency call.

The driver of the emergency vehicle on call is not relieved of the duty "to drive with due regard for the safety of all persons." Ind. Code § 9-21-1-8(d); *see also* Ind. Code § 9-21-8-35(d). Whether the driver of an emergency vehicle failed to exercise due care is generally a question for jury determination. *First Nat'l Bank v. City of Portage*, 590 N.E.2d 1110 (Ind. Ct. App. 1992).

1319 People/Vehicles at Work on Highway

Laws that regulate traffic do not apply to people working on the surface of a highway, or to [motor vehicles][other equipment] while their drivers are working on the surface of a highway.

Comments

This instruction is based on Ind. Code § 9-21-1-7 and should only be used if there is a factual issue as to whether a party was engaged in work on the road.

1321 Train Operator—Duty of Care

Every train operator must use the care an ordinarily careful train operator would use under the same or similar circumstances.

Comments

Many issues of state law negligence in the operation of a train are preempted under the Federal Railroad Safety Act of 1970, 45 U.S.C. sections 421-77. *See Gochenour v. CSX Transp., Inc.*, 44 N.E.3d 794 (Ind. Ct. App. 2015); *Randall v. Norfolk Southern Railway Co.*, 800 N.E.2d 951 (Ind. Ct. App. 2004); *Rennick v. Norfolk & Western Ry.*, 721 N.E.2d 1287 (Ind. Ct. App. 2000); *Estate of Martin v. Consolidated Rail Corp. II*, 667 N.E.2d 219 (Ind. Ct. App. 1996); *Estate of Martin v. Consolidated Rail Corp.* 620 N.E.2d 720 (Ind. Ct. App. 1993). However, some state law issues of negligence may proceed. *See Gochenour*, 44 N.E.3d 794 (state law duty created by I.C. 8-6-7.6-1 to maintain unobstructed view along right-of-way); *Clayton v. Penn Cent. Transp. Co.*, 376 N.E.2d 524 (Ind. Ct. App. 1978) (duty to non sui juris child when railroad had actual or constructive knowledge of children on the tracks).

See Estate of Martin v. Consolidated Rail Corp., 620 N.E.2d 720 (Ind. Ct. App. 1993), for a discussion of federal preemption under the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-477.

B. Carrier of Passengers**1322 Motorcycle Helmets**

Indiana law does not require an adult to wear a helmet while riding a motorcycle [except for a rider with a learner's permit]. The fact that [*Plaintiff*] was not wearing a helmet at the time of this occurrence cannot be considered by you as evidence of [fault/contributory negligence/incurred risk/failure to mitigate damages] on the part of [*Plaintiff*].

Comments

Under the common law, a plaintiff ordinarily does not have a duty to anticipate the negligence of another. *Hopper v. Carey*, 716 N.E.2d 566, 574 (Ind. Ct. App. 1999). There is no common law duty to wear a helmet or other protective clothing or gear while riding a motorcycle. *State v. Eaton*, 659 N.E.2d 232, 236 (Ind. Ct. App. 1995). Only minors are required to wear an approved helmet and protective glasses, goggles or transparent face shields, not riding boots or chaps. Ind. Code § 9-19-7-1.

1323 Carrier of Passengers—Definition

A common carrier is one who represents to the public that it is in the business of transporting [passengers][household goods] for a fee and invites the general public to use its services.

Comments

A common carrier is one who represents to all people alike, that the carrier is engaged in the business of transporting persons, or certain kinds of property, and is prepared and ready to carry all who apply on the same terms. A common carrier is distinguished from a private carrier by its undertaking to serve all alike on the same terms. *Cleveland, C., C. & S. L. Ry. Co. v. Henry*, 170 Ind. 94, 83 N.E. 710 (1908); *Heger v. Trustees of Indiana University*, 526 N.E.2d 1041 (Ind. Ct. App. 1988).

For purposes of the Motor Carrier Regulation, a common carrier is one who professes to the general public to engage in the transportation by motor vehicle of passengers for compensation. Ind. Code §§ 8-2.1-17-4; 8-2.1-22-1.

The modern concept of common carriers of passengers, besides railroads, may include other motor and electric vehicles and conveyances such as buses, taxicabs, elevators, escalators, ferry and other boats, and aircraft.

1325 Passenger—Definition

A passenger is a person [other than an employee of the carrier then on duty] who, with the actual or implied consent of the common carrier, is boarding, riding, or exiting the carrier's vehicle.

Comments

This instruction should be modified to conform to the factual situation. The words "other than an employee of the carrier then on duty" should be omitted unless there is a question of fact about whether the person was an employee or was on duty.

A passenger is one who travels in a public conveyance by virtue of an express or implied contract with the carrier for a fare or an accepted equivalent. *Indianapolis Traction & Term. Co. v. Romans*, 40 Ind. App. 184, 79 N.E. 1068 (1907). The purchase of a ticket by a passenger and its acceptance by the carrier on its train gives the holder of the ticket the rights of a passenger. *Pittsburgh, C., C. & S. L. Ry. Co. v. Higgs*, 165 Ind. 694, 76 N.E. 299 (1905). An employee given a ticket to ride to and from work is a passenger. *Indiana Union Traction Co. v. Langley*, 178 Ind. 135, 98 N.E. 728 (1912). A person is a passenger even if he mistakenly gets on the wrong train. *Cincinnati, H. & I.R.R. v. Carper*, 112 Ind. 26, 13 N.E. 122 (1887).

A person remains a passenger until he has reached his destination, gotten off the train, and had a reasonable time to leave the place where passengers are discharged; but he is no longer a passenger if he leaves the train and stops in a waiting room to engage in social conversation for ten minutes. *Glenn v. Lake Erie & W. R. Co.*, 165 Ind. 659, 75 N.E. 282 (1905). A person stepping from a moving train at his destination, because train started before he had time to alight, is still a passenger. *Pittsburgh, C., C. & S. L. Ry. Co. v. Gray*, 28 Ind. App. 588, 64 N.E. 39 (1901). But when a person steps off a streetcar, he becomes a traveler on the public street, charged with using reasonable care. *Indianapolis St. R. Co. v. Tenner*, 32 Ind. App. 311, 67 N.E. 1044 (1903). If, through negligence of a carrier, a passenger is carried beyond his station, the relation of passenger and carrier may continue while the passenger is returning to his station. *Terre Haute, I. & E. Traction Co. v. Hunter*, 62 Ind. App. 399, 111 N.E. 344 (1916).

1327 Duty to Passenger Generally

[Defendant, _____, is a common carrier.]

A common carrier must use reasonable care for the safety of its passengers.

Comments

While early Indiana cases indicated that a carrier was required to exercise the highest degree of care towards passengers and was liable for the slightest negligence, the modern rule is that a carrier needs only to exercise ordinary or reasonable care under the circumstances. *Heger v. Trustees of Indiana University*, 526 N.E.2d 1041 (Ind. Ct. App. 1988); *Swallow Coach Lines, Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938); *Stradling v. Hahn*, 88 Ind. App. 117, 163 N.E. 527 (1928).

1329 Duty to Protect Passenger from Injury by Passengers, Third Persons, and Employees

A common carrier must use reasonable care in protecting its passengers from:

- (1) the negligent acts of its employees, and
- (2) the misconduct of [other passengers][persons not its passengers][its employees].

Comments

Although common carriers are not insurers of the safety of their passengers, they must protect passengers from the unprovoked assault or misconduct of a fellow passenger where the carrier's employees have reason to anticipate from existing conditions that the safety of the passengers is endangered and the employees had sufficient time to protect the passengers. *Sheehan v. New York Cent. R.R.*, 108 Ind. App. 38, 27 N.E.2d 100 (1940); *Pittsburgh, C., C. & S. L. Ry. Co. v. Retz*, 71 Ind. App. 581, 125 N.E. 424 (1919); *Evansville & I. R. Co. v. Darting*, 6 Ind. App. 375, 33 N.E. 636 (1893); *see also* Ind. Code § 8-21-4-5 (regarding aircraft collisions).

Carriers are also responsible for the negligent and willful wrongs of their employees in the line of their employment. *Louisville & N. R. Co. v. Kelly*, 92 Ind. 371, 372 (1883).

1331 Duty to Protect Passengers from Intentional Harm by Employees

A common carrier is liable for any intentional harm caused to a passenger by the common carrier's employee[s][while on duty].

Comments

The words "while on duty" should be omitted from the instruction unless there is a question of fact raised about whether the employee was on duty.

A carrier is liable for intentional injury to a passenger inflicted by an employee even if the employee is not acting within the scope of his employment, as long as the employee is "on duty." *Blatimore & O. S. W. R. Co. v. Davis*, 44 Ind. App. 375, 89 N.E. 403 (1909) (superseded by statute on other grounds regarding punitive damages as recognized by *Estate of Mayer v. Lax, Inc.*, 998 N.E.2d 238 (Ind. Ct. App. 2013)).

1333 Duty to Disabled, Infirm, or Intoxicated Person or to Child

When a common carrier knows that a passenger is [disabled][frail or infirm][intoxicated][a child][a child traveling alone], so that the hazards of travel increase for that passenger, the carrier must use the reasonable care and diligence that the circumstances require.

Comments

This instruction should be given only where there is an issue of disability raised by the evidence.

A common carrier that is on notice that a particular passenger is disabled or infirm must use a greater degree of care for that passenger than for other passengers. *Heger v. Trustees of Indiana Univ.*, 526 N.E.2d 1041, 1043, n.4 (Ind. Ct. App. 1988).

1335 Duty to Provide Place to Wait, Board, and Alight

A common carrier must use reasonable care to provide a reasonably safe place for passengers to wait for, board, and exit the carrier's vehicle.

Comments

A common carrier must use reasonable care to give passengers a reasonably safe place for them to alight. *Heger v. Trustees of Indiana Univ.*, 526 N.E.2d 1041, 1043 (Ind. Ct. App. 1988); *Evansville R. Co. v. Miller*, 64 Ind. App. 206, 111 N.E. 1031 (1916); *Harris v. Pittsburgh, C., C. & S. L. Ry. Co.*, 32 Ind. App. 600, 70 N.E. 407 (1904); *New York, C. & S. L. R. Co. v. Doane*, 115 Ind. 435, 17 N.E. 913 (1888).
A taxi's duty to passengers leaving the taxi is not the same as a railroad's duty to passengers, because the railroad has complete control over the right-of-way and stations where passengers alight. *Hudnut v. Indiana De Luxe Cab Co.*, 98 Ind. App. 44, 182 N.E. 711 (1932).

1337 Passenger Complying with Rules—Carrier Liable for Expulsion

A common carrier is liable for failing to transport, expelling, or threatening to expel a passenger who follows its rules and is entitled to transportation.

A common carrier cannot excuse its conduct by claiming that it acted in good faith.

Comments

A carrier has authority to eject passengers under certain circumstances. *See, e.g.*, Ind. Code § 8-3-18-2 (disorderly passengers). A carrier is liable, however, for ejecting a passenger rightfully on the conveyance at a place other than the passenger's destination. *Indianapolis Traction & Terminal Co. v. Lockman*, 49 Ind. App. 143, 96 N.E. 970 (1911); *Whitewater V. R. Co. v. Butler*, 112 Ind. 598, 14 N.E. 599 (1887). The carrier is liable only if the ejecting employee was acting in the course of his employment. *Wabash R. Co. v. Savage*, 110 Ind. 156, 9 N.E. 85 (1886).

A carrier's wrongful refusal or failure to carry passengers is a tort. *Pittsburgh, C., C. & S. L. Ry. Co. v. Friend*, 194 Ind. 579, 142 N.E. 709 (1924); *Cincinnati, H. & I. R. Co. v. Eaton*, 94 Ind. 474, 48 Am. Rep. 179 (1884). Forcible ejection from a carrier is an intentional tort, *Chicago, S. L. & P. R. Co. v. Bills*, 118 Ind. 221, 20 N.E. 775 (1889), for which pain, suffering, loss of time, shame, and humiliation are elements of damage, *Union Traction Co. v. Smith*, 70 Ind. App. 40, 123 N.E. 4 (1919); *Indiana Ry. Co. v. Orr*, 41 Ind. App. 426, 84 N.E. 32 (1908); *Louisville, N.A. & C. Ry. v. Goben*, 15 Ind. App. 123, 42 N.E. 1116 (1896).

If a carrier negligently gives a passenger a defective ticket, for which the passenger is ejected, the carrier is liable. *Union Traction Co.*, 123 N.E. 4; *Indiana Ry.*, 41 Ind. App. 426; *Indianapolis St. Ry. Co. v. Wilson*, 161 Ind. 153, 66 N.E. 950 (1903).

CHAPTER 1500

MEDICAL NEGLIGENCE

SYNOPSIS

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1501 Issues for Trial; Burden of Proof

The Plaintiff, _____, sued _____, the Defendant.

[Plaintiff] claims that [defendant][insert claimed action(s)]. [Plaintiff] must prove [his][her][its] claims by the greater weight of the evidence.

[Defendant] denies [plaintiff]'s claims. [Defendant] is not required to disprove [plaintiff]'s claims.

[Defendant] has claimed certain defenses. [Defendant] must prove [his][her][its] defense[s] of [specify affirmative defense(s)] by the greater weight of the evidence.

[(Plaintiff) also claims (he)(she)(it) is entitled to an award of punitive damages because (insert brief statement of claim for punitive damages). (Plaintiff) must prove this claim by clear and convincing evidence.]

Comments

This instruction should be modified to set forth all claims, counterclaims, and cross claims.

Jury Rule 20 and Trial Rule 51(A) require that the trial court give preliminary instructions as to the issues for trial and the burden of proof. The trial court and counsel should carefully prepare a preliminary instruction setting out the issues for trial in narrative form, including all claims, counterclaims, and cross claims. The instruction should be brief, accurate, conversational, and as non-technical as possible.

If a pretrial order has been entered, *see* T.R. 16(J), the Committee recommends that the instruction be drafted based on that order, which supplants the allegations in the pleadings, but should not be rigidly or pointlessly applied. *See Vlach v. Goode*, 515 N.E.2d 569 (Ind. Ct. App. 1987); 62 Am. Jur. 2d PreTrial Conference § 29 at 661 (1972).

Whether a pretrial order has been entered or not, the Committee recommends against reading the pleadings to the jury.

If a judge gives this Instruction as a final instruction, he or she should also give Instruction No. 1503, or otherwise ensure that the jury is instructed on the elements of a negligence claim.

1503 Elements; Burden of Proof

[Plaintiff] claims [defendant] was [negligent][designate other type of fault].

To recover on this claim, [plaintiff] must prove by the greater weight of the evidence that:

1. [defendant] acted or failed to act [by][in one or more of the following ways]:
[insert how plaintiff claims that defendant was negligent or otherwise at fault];
and
2. [defendant]'s act or failure to act was [negligent][designate other type of fault];
and
3. [defendant]'s act or failure to act was a responsible cause of [plaintiff]'s claimed injuries; and
4. [plaintiff] suffered damages as a result of the injuries.

To recover an award of punitive damages, [plaintiff] must prove by clear and convincing evidence that:

[Here set out the elements of plaintiff's claim for punitive damages to correspond to the factual disputes raised by the evidence.]

[Defendant] denies [plaintiff]'s claims. [Defendant] is not required to disprove [plaintiff]'s claims.

A defendant may defend [himself][herself] by claiming certain specific "defenses." In this case [defendant] claims: [Here set out the elements of defendant's affirmative defenses to correspond to the factual disputes raised by the evidence.] To prove these defenses, [defendant] must prove by the greater weight of the evidence that:

[Here set out the elements of defendant's affirmative defenses to correspond to the factual disputes raised by the evidence.]

Comments

In *Laporte Cmty. Sch. Corp. v. Rosales*, 963 N.E.2d 520, 524 (Ind. 2012), the Indiana Supreme Court criticized an instruction based on Civil Pattern Instruction No. 9.03, stating:

While Instruction 22 may have been intended to explain to the jury that the plaintiff had the burden of proving the elements of negligence, proximate cause, and damages, the language and phrasing of the instruction permitted the jury to infer that the factual allegations set forth in subparts A-E should be understood as factual circumstances identified by the court, based on the facts of the case, that automatically constitute negligence if proven by a preponderance of the evidence.

But see *Hill v. Rhinehart*, 45 N.E.3d 427 (Ind. Ct. App. 2015), distinguishing *Rosales* and determining that the jury instruction given in a medical malpractice case was proper because it "did not include any confusing factual recitations, but rather amounted to a straight forward statement which focused on the proper

standard of care for finding medical negligence.”

The Committee has therefore revised this instruction to set forth the elements of negligence.

In element 1, the judge should use “by” if the plaintiff claims the defendant was negligent in one way, and should use “in one or more of the following ways” if the plaintiff claims the defendant was negligent in more than one way. If the plaintiff claims the defendant was negligent in more than one way, and the instruction lists each of the ways in which the defendant was negligent, the judge should be careful to separate those allegations with the word “or” rather than “and” to avoid mistakenly telling the jury that all allegations of negligence must be proven.

The judge can decide how specific to make the description of how plaintiff claims that the defendant was negligent, from a general description of the claim (“in the way he operated a motor vehicle”) to a specific list of all of plaintiff’s allegations (“in one of the following ways: (1) running the red light, or (2) exceeding the speed limit”).

A judge should further modify (or add to) this Instruction if the case involves a type of fault other than (or in addition to) negligence, such as gross negligence. The punitive damages elements are found in Instruction Nos. 737 to 745.

This instruction should be modified to reflect the factual situation of each case. If this instruction is given at the close of the evidence, it should set out allegations in the pleadings that are supported by the evidence; allegations with no supporting evidence should be omitted from the instruction.

The Committee has included both this instruction and the previous instruction in this chapter so that a judge can give either one (or both), based on his or her preference.

1511 Medical Negligence—Health Care Provider

In providing health care to a patient, a [*type of health care provider*] must use the degree of care and skill that a reasonably careful, skillful, and prudent [*type of health care provider*] would use under the same or similar circumstances.

A [*type of health care provider*] who fails to exercise that reasonable care and skill commits medical negligence.

Medical negligence may consist of:

- (1) doing something a [*type of health care provider*] should not have done under the circumstances; or
- (2) not doing something a [*type of health care provider*] should have done under the circumstances.

Comments

Indiana Code § 34-18-2-14 defines “health care provider.”

In a medical malpractice action based on negligence, the plaintiff must establish: (1) defendant had a duty in relation to the plaintiff; (2) defendant failed to conform to the requisite standard of care required by the relationship; and (3) plaintiff was injured as a result of that failure. *Munsell v. Hambright*, 776 N.E.2d 1272, 1279 (Ind. Ct. App. 2002).

The Supreme Court of Indiana did away with the locality rule. *Vergara v. Doan*, 593 N.E.2d 185 (Ind. 1992). The standard of care is that a physician must exercise that degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which the practitioner belongs, acting under the same or similar circumstances. Under that standard, locality is only one factor to be considered, along with advances in the profession, availability of activities, and whether the doctor is a specialist or general practitioner. *Allen v. Hinchman*, 20 N.E.3d 863, 870 (Ind. Ct. App. 2014).

Preconception torts, or torts alleging a defendant’s conduct caused abnormalities in infants that would otherwise have been born normal and healthy, are not barred for lack of duty and require balancing of three factors: relationship between parties, reasonable foreseeability of harm, and public policy concerns. *Walker v. Rinck*, 604 N.E.2d 591 (Ind. 1992); *see also Yeager v. Bloomington Obstetrics & Gynecology, Inc.*, 585 N.E.2d 696 (Ind. Ct. App. 1992), *summarily aff’d*, 604 N.E.2d 598 (Ind. 1992).

1513 Responsible Cause (Proximate Cause)—Definition

A health care provider's conduct is legally responsible for causing [an injury][property damage][a death] if:

- (1) the [injury][property damage][a death] would not have occurred without the conduct, and
- (2) the [injury][property damage][a death] was a natural, probable, and foreseeable result of the conduct.

This is called a "responsible cause."

[There can be more than one responsible cause for an injury.]

Comments

Scholars identify the use of legal jargon and arcane legalese as the most serious flaws of contemporary jury instructions. John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1209 (2002). In fact, in one study of 14 jury instructions, the proximate cause instruction produced proportionally the most misunderstanding among laypersons. The study revealed that jurors mistake "proximate cause" for "approximate cause," "estimated cause," or some fabrication. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979); see also Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L.J. 456, 468 (1962) ("proximate cause" is frequently misinterpreted to mean "probable" or "approximate cause"); James D. Wascher, *The Importance of Juries: The Long March Toward Plain English Jury Instructions*, 19 Chicago Bar Ass'n Record 50, 50-51 (2005) (a Chicago judge reported that he presided over a trial in which the jury sent him a note asking whether proximate cause meant "it's pretty close to the cause").

Prosser and Keeton say that proximate cause is "is an unfortunate word, which places entirely the wrong emphasis on the factor of physical or mechanical closeness." Prosser & Keeton, *The Law of Torts* § 42 (5th ed. 1984). They even imply that it was a sin to have coined the term "proximate cause" in the first place. Prosser & Keeton, *The Law of Torts* § 42. ("The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins.") The Committee has determined that use of a term so likely to be misunderstood is against the policy behind clear jury instructions.

There are two types of causation in a negligence case—causation in fact and proximate cause. See, e.g., Prosser & Keeton, *The Law of Torts* §§ 41 (causation in fact), 42 (proximate cause). Causation in fact is the threshold question of whether "but for" the defendant's negligent conduct, plaintiff's harm would not have occurred. Or, to put it another way, plaintiff's harm would not have occurred without the defendant's negligent conduct. *Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981) (citing W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971); 21 I.L.E. Negligence § 62 (1959)). Because the consequences of an act go forward to eternity and back before the dawn of human events, there must also be "some reasonable connection between the act or omission of the defendant and

the damage which the plaintiff has suffered.” Prosser & Keeton, *The Law of Torts* § 41. This is proximate cause, and it boils down to “whether the conduct has been so significant and important a cause that the defendant should be legally responsible.” Prosser & Keeton, *The Law of Torts* § 41. Prosser and Keeton therefore suggest that either “responsible cause” or “legal cause” would be a more appropriate term. Prosser & Keeton, *The Law of Torts* § 41. Because use of the term “legal cause” might suggest to the jury that there could also be an “illegal cause,” the Committee selected “responsible cause.”

The Indiana Supreme Court has held that a proximate cause instruction is not *required* to refer to “but for” causation, “so long as the instructions as a whole adequately convey the law in this area.” *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 301 (Ind. 2009). To ensure that the instructions as a whole *do* adequately convey both proximate cause and causation in fact, the Committee has included both concepts in this one instruction. Subpart (1) of the instruction (“the injury would not have occurred without the conduct”) instructs on causation in fact. And because the Indiana Supreme Court has explained proximate cause as the natural and probable consequence of the conduct, subpart (2) of the instruction (“the injury was a natural and probable result of the conduct”) instructs on proximate cause. “A negligent act is said to be the proximate cause of an injury ‘if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.’ ” *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003) (quoting *Bader v. Johnson* 732 N.E.2d 1212, 1218 (Ind. 2000)).

Plaintiff in a negligence action has the burden of proving causation in fact by a preponderance of the evidence. *Turner v. Davis*, 699 N.E.2d 1217 (Ind. Ct. App. 1998) (causation in fact); *Carter v. Aetna Life Ins. Co.*, 217 Ind. 282, 27 N.E.2d 75 (1940) (proximate cause). What is the proximate cause of the injury is ordinarily a question of fact for the jury that becomes a question of law when only a single conclusion can be drawn from the facts. *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101 (Ind. Ct. App. 1999).

The court is not required to repeat the substance of an instruction defining proximate cause, and outlining the necessity of establishing it, in every general instruction relating to the subject of negligence. *Swallow Coach Lines, Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938).

The “conduct” discussed in this Instruction includes acts and omissions. *See, e.g.*, Instruction Nos. 909 and 1107.

There can be more than one responsible cause for an injury. *See, e.g.*, *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006) (“An injury may have more than one proximate cause.”); *Board of Comm’rs v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992) (“There may be more than one proximate cause of an event.”); *Krohn v. Shidler*, 140 Ind. App. 175, 185 (1966) (“It is not necessary that such negligence be the sole proximate cause.”). The bracketed sentence about multiple responsible causes should be given when it is an issue in the case.

1514 Foreseeable—Defined

[An injury][A death] is “foreseeable” when a [type of health care provider] should have known that [his][her] act or failure to act might reasonably cause the [injury][death].

Comments

This instruction should be given only when *foreseeability of harm* is an issue in a medical negligence case.

In a medical negligence case, medical professionals and patients have a legally recognized relationship establishing a duty from the physician to the patient. Therefore, in a physician-patient relationship, the physician’s duty to the patient is clear, and foreseeability is irrelevant in deciding the duty owed by the physician to the patient. *Giles v. Anonymous Physician I*, 13 N.E.3d 504, 510–11 (Ind. Ct. App. 2014), *transfer denied*, citing *Miller v. Martig*, 754 N.E.2d 41, 46 (Ind. Ct. App. 2001); *Walker v. Rinck*, 604 N.E.2d 591, 594 (Ind. 1992).

In a medical negligence case, *foreseeability of harm* is usually not an issue. It is very likely that the medical professional will not dispute the fact that the risk of harm from the chosen treatment was foreseeable. The jury must decide whether the medical professional acted unreasonably in facing that risk.

In certain fact situations, *foreseeability of harm* may be an issue. The parties may dispute whether the medical professional should have anticipated the risk of harm associated with his or her treatment decisions.

For example, a physician in a hospital was treating an inmate for medical issues. The physician released an inmate to return to jail, and the inmate committed suicide after his return. The doctor argued he could not reasonably have expected the inmate/patient would commit suicide. *Keebler v. Winfield Carraway Hospital*, 531 So.2d 841, 844–45 (Ala. 1988); *Fernandez v. Baruch*, 244 A.2d 109 (N.J. 1968). *See also Cox v. MetroHealth Medical Center*, 39 N.E.3d 843 (Ohio Ct. App. 2015) (hospital argued its staff could not anticipate the particular injury would result from administering “back blows” to an infant).

The medical professional does not have to foresee the injury or death exactly as it happened. The injury or death is foreseeable if the medical professional would reasonably have anticipated such a result. *See, generally, Hampton v. Moistner*, 654 N.E.2d 1191, 1194 (Ind. Ct. App. 1995). For medical negligence cases, *see, e.g., Cromer v. Children’s Hospital Medical Center of Akron*, 29 N.E.3d 921 (Ohio 2015).

1515 Duty of Medical Specialist

A medical specialist focuses his or her practice on diagnosing and treating a particular medical condition, consistent with the state of scientific knowledge at the time.

A medical specialist must use the same degree of care and skill that other specialists in the field would have used under the same or similar circumstances at the time of treatment.

Comments

The degree of skill and care required of physician employed because he is a specialist is that degree of skill and knowledge ordinarily possessed by physicians who devote special attention to the ailment, its diagnosis, and treatment. *Bassett v. Glock*, 174 Ind. App. 439, 368 N.E.2d 18 (1977); see also *Hobbs v. Tierney*, 495 N.E.2d 217 (Ind. Ct. App. 1986); *Dolezal v. Goode*, 433 N.E.2d 828 (Ind. Ct. App. 1982); 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers § 209.

1517 Duty to Refer to Specialist

A health care provider who is not qualified to treat a patient because [he][she] does not practice in a specialty, or lacks the necessary training or facilities, must advise the patient to consult a specialist or another qualified health care provider(s).

Comments

A judge should only give an instruction on the duty to refer to a specialist if the doctor is presented with a problem beyond the doctor's expertise. *See Fridono v. Chuman*, 747 N.E.2d 610 (Ind. Ct. App. 2001) (evidence did not support duty to refer instruction where patient presented a problem within doctor's specialty, and doctor treated the problem based on recognized methods within the specialty).

Expert medical testimony is generally required to establish the content of reasonable disclosure unless the situation is clearly within a layperson's comprehension, for example, where the disclosure is so obvious that a layperson could recognize the necessity of the disclosure. *See Kranda v. Houser-Norborg Medical Corp.*, 419 N.E.2d 1024, 1037 (Ind. Ct. App. 1981) (evidence did not support duty to refer instruction where no expert testified that gynecologist should have referred patient with a gastroenterological problem to another doctor). Experts are ordinarily indispensable to identify and elucidate for the jury the risks of therapy and the consequences of leaving existing maladies untreated. *Kranda*, 419 N.E.2d at 1037.

1519 Joint Duty of Health Care Providers Qualified Under the Medical Malpractice Act

If you decide that [*name of health care providers*] were both medically negligent, and that their negligence was a responsible cause of the same injury, then regardless of their degree of negligence, they are both liable for the entire amount of [*plaintiff*]'s damages, and you must return a verdict against both defendants in a single amount for the total damages. Do not consider the amount that any individual defendant will pay toward your verdict. [*Plaintiff*] will not collect more than the total amount of your verdict.

Comments

This instruction applies the principle of joint and several liability, which does not apply in comparative fault cases. *See R.L. McCoy v. Jack*, 772 N.E.2d 987, 989–90 (Ind. 2002) (Comparative Fault Act replaces joint and several liability with several liability). “Qualified health care” providers are exempted from the comparative fault statute. Ind. Code § 34-51-2-1(b). Thus, this instruction could apply if the health care provider is “qualified.” If they are not “qualified,” however, comparative fault would apply, and this instruction would be inappropriate.

Indiana Code § 34-18-2-14 defines “health care provider.” A health care provider is “qualified” if he or his insurance carrier: (1) causes proof of financial responsibility to be filed with the insurance commissioner, and (2) pays an assessed surcharge. Ind. Code § 34-18-3-2.

A joint and common duty does not exist between a family physician and a surgeon whom he recommends, because the family physician has no control over the acts of the surgeon specialist. *Miller v. Ryan*, 706 N.E.2d 244, 251 (Ind. Ct. App. 1999). As to joint or concurrent partnership liability of physicians, *see* 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers § 166. *See also* W. R. Habeeb, Annotation, *Liability of One Physician or Surgeon for Malpractice of Another*, 85 A.L.R.2d 889 (2008).

1521 Delegation of Duties—Foreign Objects

A doctor who performs an operation on a patient must make certain that [foreign object(s)][is][are] removed and is not relieved of that responsibility by giving that duty to someone else.

Comments

The Indiana Court of Appeals has called this instruction the “captain of the ship” instruction. *Miller v. Ryan*, 706 N.E.2d 244, 250 (Ind. Ct. App. 1999).

A surgeon may not escape his responsibility to remove sponges used during the surgery simply by delegating responsibility for tracking surgical sponges to others. *Chi Yun Ho v. Frye*, 880 N.E.2d 1192, 1200 (Ind. 2008); *Funk v. Bonham*, 204 Ind. 170, 183 N.E. 312, 316 (1932); *Baumgart v. DeFries*, 888 N.E.2d 199, 209–10 (Ind. Ct. App. 2008); *Miller*, 706 N.E.2d at 251.

1523 Right to Rely upon Health Care Provider

The patient-[*type of health care provider*] relationship is one in which the patient trusts the [*type of health care provider*], because the patient lacks the knowledge, skill, and experience of the [*type of health care provider*] in those subjects which are vitally important to the patient.

A patient has a right to rely upon the [*type of health care provider*].

Comments

Umolu v. Rosolik, 666 N.E.2d 450 (Ind. Ct. App. 1996); *Adams v. Luros*, 406 N.E.2d 1199 (Ind. Ct. App. 1980); *see also Weinstock v. Ott*, 444 N.E.2d 1227, 1236 (Ind. Ct. App. 1983) (because of the fiduciary nature of the physician-patient relationship, a physician has a duty to disclose material information to the patient, and a failure to do so results in fraudulent concealment).

1525 Choice of Treatment Modalities

[*Health care providers*] are allowed broad discretion in selecting treatment methods and are not limited to those most generally used.

When more than one accepted method of treatment is available, the [*type of health care provider*] must use sound judgment in choosing which method to use.

If a [*type of health care provider*] uses sound judgment in selecting from a variety of accepted treatments, and uses reasonable care and skill in treating a patient, then the [*type of health care provider*] is not responsible if the treatment does not succeed.

The fact that other methods existed or that another [*type of health care provider*] would have used a different treatment does not establish medical negligence.

Comments

Physicians are not required to use any particular method of treatment. *Fridono v. Chuman*, 747 N.E.2d 610, 622 (Ind. Ct. App. 2001). A surgeon may adopt any method of treatment recognized by surgeons of ordinary skill. *Fridono*, 747 N.E.2d at 622; *see also Kranda v. Houser-Norborg Medical Corp.*, 419 N.E.2d 1024 (Ind. Ct. App. 1981).

1527 Informed Consent

A patient must consent to the treatment [he][she] receives. A patient's decision to undergo a particular treatment must be an informed choice.

Health care providers must tell a patient the important facts about possible treatments. Before making a choice, a patient has a right to know [the nature of a proposed treatment][other available treatments][the risks involved].

Comments

A physician has a duty to disclose to the patient material facts relevant to the patient's decision about treatment. *Bader v. Johnson*, 732 N.E.2d 1212, 1217 (Ind. 2000). The duty arises from the relationship between the doctor and patient, and, like most legal duties, is imposed as a matter of law. *Bader*, 732 N.E.2d at 1217.

A physician's duty to conform to the standard of care requires that he provide information to a patient that will permit the patient to decide whether to have a contemplated procedure. *Bowman v. Beghin*, 713 N.E.2d 913 (Ind. Ct. App. 1999).

Generally, incurred risk is not a defense to medical malpractice based on lack of informed consent. *Spar v. Cha*, 907 N.E.2d 974, 976 (Ind. 2009) (also holding that plaintiff's consent to prior surgeries were admissible to counter her lack of informed consent claim to the extent that claim was based on failure to inform her of typical risks in the procedure).

1529 Informed Consent—Elements—Burden of Proof

[*Plaintiff*] claims that [*defendant*] did not inform [him][her] of [the nature of a proposed treatment][other treatments available][the risks involved].

To recover damages from [*defendant*], [*plaintiff*] must [use expert testimony to] prove by the greater weight of the evidence that a [*type of health care provider*], using reasonable care and skill under the circumstances of this case, would have informed [*plaintiff*] of [the nature of the proposed treatment][other treatments available][the risks involved for the patient].

Specifically, [*plaintiff*] must prove the following by the greater weight of the evidence:

- (1) [*defendant*][performed][prescribed][*describe treatment that plaintiff claims defendant performed or prescribed*];
- (2) [*defendant*] had a duty to inform [*plaintiff*] of [an] important fact[s] concerning the treatment;
- (3) [*defendant*] did not inform the plaintiff of those fact[s];
- (4) a reasonable person in the same or similar circumstances as [*plaintiff*] would not have consented to [*treatment*] had [she][he] been informed of those fact[s]; and
- (5) [*defendant*]'s failure to inform was a responsible cause in causing [*plaintiff*]'s [death][injury].

Comments

Generally, expert medical opinion testimony is required to establish the content of reasonable disclosure. *Culbertson v. Mernitz*, 602 N.E.2d 98 (Ind. 1992). Where laypeople could comprehend that a failure to disclose had occurred, however, expert opinion is not required. *Bowman v. Beghin*, 713 N.E.2d 913 (Ind. Ct. App. 1999).

The plaintiff must establish that, had the doctor informed the plaintiff, the plaintiff would not have consented to treatment. *Boston v. GYN, Ltd.*, 785 N.E.2d 1187, 1192 (Ind. Ct. App. 2003).

In a medical malpractice action, a physician's failure to obtain informed consent rises to the level of battery only when the doctor completely fails to obtain informed consent. *Van Sice v. Sentany*, 595 N.E.2d 264 (Ind. Ct. App. 1992).

Generally, incurred risk is not a defense to medical malpractice based on negligence or lack of informed consent. *Spar v. Cha*, 907 N.E.2d 974, 976 (Ind. 2009) (also holding that plaintiff's consent to prior surgeries were admissible to counter her lack of informed consent claim to the extent that claim was based on failure to inform her of typical risks in the procedure).

1531 Consent Required; Express and Implied Consent Defined

A [*type of health care provider*] may not provide health care to a patient without the patient's consent. A patient's consent may be express or implied.

"Express consent" means actual, direct, or explicit permission, whether oral or written.

"Implied consent" means permission that is not expressly given, but which the [*type of health care provider*] would reasonably understand from the patient's conduct and surrounding circumstances.

Comments

A patient who is both competent and of age can consent to health care decisions. Ind. Code § 16-36-1-3. A doctor's failure to obtain any consent at all is a battery. *See Spar v. Cha*, 907 N.E.2d 974, 979 (Ind. 2009) ("Lack of informed consent to a harmful touching in medical malpractice cases was traditionally viewed as a battery claim. More recently, unless there is a complete lack of consent, the theory is regarded as a specific form of negligence for breach of the required standard of professional conduct.")

For a list of persons authorized to give consent to medical treatment on behalf of a patient, *see* Ind. Code §§ 16-36-1-5 (competent patients), 16-36-1.5-5 (mentally incompetent patients). For emergency situations where consent may not be required, *see* Instructions Nos. 1535 and 1537. For a discussion about a doctor's duty to inform a patient before consent, *see* Instruction No. 1529 cmt.

1533 Incapacity to Consent

When the patient is unable to consent to treatment because the patient is [a minor][unconscious][incompetent], a [type of health care provider] must obtain the consent from someone authorized to give consent for the patient.

Comments

A patient who is both competent and of age can consent to health care decisions. Ind. Code § 16-36-1-3.

For a list of persons authorized to give consent to medical treatment on behalf of a patient, *see* Ind. Code §§ 16-36-1-5 (competent patients), 16-36-1.5-5 (mentally incompetent patients). For emergency situations where consent may not be required, *see* Instructions Nos. 1535 and 1537. For a discussion about a doctor's duty to inform a patient before consent, *see* Instruction No. 1529 cmt.

1535 Consent Not Required—Emergency Operation

Ordinarily, a [type of health care provider] must obtain consent before treating a patient.

However, consent is not necessary under emergency conditions when:

- (1) immediate treatment is necessary;
- (2) obtaining consent is impossible; or
- (3) when delay would endanger the patient's life or health.

Comments

Consent for emergency medical or surgical treatment is specifically not required by Indiana law. *See* Ind. Code § 16-36-3-3 (“The methods of consent set forth in this chapter [on treatment of incompetent patients] do not exclude other lawful methods of consent or require consent in an emergency.”).

1537 Consent Not Required—Additional Surgery

Generally, a [type of health care provider] must obtain the patient's consent for a specific operation.

However, if:

- (1) during the operation the [type of health care provider] discovers conditions that could not have been reasonably foreseen;
- (2) additional surgery is necessary to preserve the patient's life or health; and
- (3) the [type of health care provider] cannot obtain consent from the patient or a person authorized to give consent,

then the [type of health care provider] may perform the additional necessary surgery.

Comments

A patient's written consent to a scheduled surgery does not constitute consent to another type of operation in the absence of evidence that a necessity arose during the authorized operation. *Lloyd v. Kull*, 329 F.2d 168 (7th Cir. 1964).

A plaintiff's consent to prior surgeries were admissible to counter her lack of informed consent claim to the extent that claim was based on failure to inform her of typical risks in the procedure. *Spar v. Cha*, 907 N.E.2d 974, 976 (Ind. 2009).

1539 Expert Testimony Required

In deciding whether [*defendant*] used reasonable care and skill in treating [*plaintiff*], you must consider only the expert testimony of health care providers familiar with the applicable standard of care.

Comments

Because of the technical and complex nature of medical diagnosis and treatment, expert testimony is generally required to establish the applicable standard of care. *Boston v. GYN, Ltd.*, 785 N.E.2d 1187, 1190 (Ind. Ct. App. 2003); *Culbertson v. Mernitz*, 602 N.E.2d 98 (Ind. 1992); *Kranda v. Houser-Norborg Medical Corp.*, 419 N.E.2d 1024 (Ind. Ct. App. 1981); *Bassett v. Glock*, 174 Ind. App. 439, 368 N.E.2d 18 (1977); *McIntosh v. Cummins*, 759 N.E.2d 1180 (Ind. Ct. App. 2001); *Overshiner v. Hendricks Reg'l Health*, 119 N.E.3d 1124 (Ind. Ct. App. 2019).

A plaintiff need not present expert testimony, however, when deviation from the standard of care is commonly known to laypersons, and when the physician's conduct is so obviously substandard that one need not possess medical expertise to recognize the breach of the standard of care. *Boston*, 785 N.E.2d at 1190–91; *Culbertson*, 602 N.E.2d at 100; *see also Bowman v. Beghin*, 713 N.E.2d 913 (Ind. Ct. App. 1999) (failure to provide informed consent); *Burke v. Capello*, 520 N.E.2d 439 (Ind. 1988), *overruled in part by Vergara v. Doan*, 593 N.E.2d 185 (Ind. 1992); *Stumph v. Foster*, 524 N.E.2d 812 (Ind. Ct. App. 1988) (expert testimony on chiropractic malpractice). This is called the “common knowledge” or “res ipsa loquitur” exception. *Boston*, 785 N.E.2d at 1190.

For instance, expert testimony is not required in cases involving a physician's failure to remove surgical implements or foreign objects from the patient's body, because the facts themselves raise an inference of negligence. *See* Instruction No. 1543; *Funk v. Bonham*, 204 Ind. 170, 183 N.E. 312 (1932) (sponge left in the abdomen after surgery); *Klinger v. Caylor*, 148 Ind. App. 508, 267 N.E.2d 848 (1971) (surgeons failed to remove surgical padding); *Walker Hosp. v. Pulley*, 74 Ind. App. 659, 127 N.E. 559 (1920) (surgeon left fifteen inches of gauze inside the patient's leg after surgery). There is some authority that a plaintiff suing for medical or professional malpractice can call the defendant as a witness, ask him about the standard of care, and then impeach him as an expert. *Linton v. Davis*, 887 N.E.2d 960 (Ind. Ct. App. 2008). In *Linton*, the plaintiff called the defendant-doctor to testify during her case in chief. During her questioning, the plaintiff asked whether the defendant believed he adhered to the standard of care. He did not object, so any error caused by the question was waived. The Court of Appeals then went on to state in dicta, “Waiver notwithstanding, we conclude [the plaintiff] could properly question [the defendant] as to the standard of care and his opinion as to whether he met that standard.” *Linton*, 887 N.E.2d at 968. Then the Court of Appeals stated that, because the doctor was being questioned as to the standard of care, he was testifying as an expert, and as an expert and as such could be impeached with his licensure status.

This instruction should not be used when the “common knowledge” or “res ipsa loquitur” exception discussed above applies.

1541 Medical Review Panel—Weight

Indiana law required that [*plaintiff*] present [*his*][*her*] case to a medical review panel.

A medical review panel is made up of three health care providers: [*plaintiff*] selects one member, [*defendant*] selects a second member, and the first two members select the third member. Do not assume that any member of the review panel is associated with, or an advocate for, any party.

The medical review panel's opinion does not resolve the issues you must decide and you may give it the weight you think appropriate.

Comments

See Ind. Code § 34-18-8-4 (plaintiff cannot commence action without opinion from medical review panel); Ind. Code ch. 34-18-10 (medical review panel procedures); see also *Kranda v. Houser-Norborg Medical Corp.*, 419 N.E.2d 1024 (Ind. Ct. App. 1981) (admission of panel's findings as expert opinion); *Hobbs v. Tierney*, 495 N.E.2d 217 (Ind. Ct. App. 1986) (panel member's testimony generally).

Ind. Code § 34-18-10-23 provides that a report of the expert opinion reached by the medical review panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law, but such expert opinion shall not be conclusive and either party shall have the right to call, at his cost, any member of the medical review panel as a witness.

When a medical review panel renders an opinion in favor of a doctor, the plaintiff must then come forward with expert medical testimony to rebut the panel's opinion; failure to provide sufficient expert testimony will usually subject the plaintiff's claim to summary disposition. *McIntosh v. Cummins*, 759 N.E.2d 1180, 1183–84 (Ind. Ct. App. 2001) (citing *Whyde v. Czarkowski*, 659 N.E.2d 625, 627 (Ind. Ct. App. 1995)).

1543 Res Ipsa Loquitur

You may assume that an act of medical negligence took place if [plaintiff] proves the following by the greater weight of the evidence:

- (1) [plaintiff] was under [defendant]'s care when the [injury][harm][death] occurred;
- (2) [defendant] had exclusive control of [plaintiff]'s actions or reactions when the [injury][harm][death] occurred;
- (3) the [injury][harm][death] was of a kind that would not have occurred unless an act of medical negligence took place; and
- (4) [defendant] had exclusive control of the instrument or (agency/means) which caused the [injury][harm][death].

If you conclude that an act of medical negligence took place, you must then consider that fact with all other evidence in deciding whether [defendant] was liable.

Comments

Res ipsa loquitur permits the jury to infer negligence as the cause of harm without proof of specific acts of negligence when the facts show that it is more likely than not that: (a) the plaintiff's harm was caused by negligence, even though the specific act of negligence is not identified, and (b) the defendant was the author of the negligence. *Cox v. Paul*, 828 N.E.2d 907, 912 (Ind. 2005) (citing Dan B. Dobbs, *The Law of Torts* § 154, at 371 (2001)).

The doctrine may be invoked in medical malpractice actions when a layperson could say as a matter of common knowledge that the use of due care would not ordinarily result in the consequences of the professional treatment; when there is no basis of common knowledge for such a conclusion, application of the doctrine may be grounded upon expert testimony. *Carpenter v. Campbell*, 149 Ind. App. 189, 271 N.E.2d 163 (1971); *Kranda v. Houser-Norborg Medical Corp.*, 419 N.E.2d 1024 (Ind. Ct. App. 1981); *see also* Instruction No. 1539 cmt. (for a discussion of when expert testimony is required).

The comments to Instruction No. 325 provide more information about the doctrine and its elements.

1545 Hospital Liability

A hospital is liable for the negligent act of its employees if the employees were acting within the scope of their employment, if the act is a responsible cause of injury to the plaintiff.

Comments

Where the usual requisites of agency or an employer-employee relationship exist, a corporation may be held vicariously liable for malpractice for the acts of its employee-physicians. *Sloan v. Metropolitan Health Council*, 516 N.E.2d 1104 (Ind. Ct. App. 1987); *see also* Ind. Code § 23-1.5-2-6.

Indiana courts limit hospital liability under the doctrine of respondeat superior and focus on whether the doctor was the hospital's employee or merely an independent contractor. *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142 (Ind. 1999).

Scott v. Retz, 916 N.E.2d 252 (Ind. Ct. App. 2009), holds that because a nurse's negligence was not a proximate cause of the plaintiff's injury, the hospital could not be held liable under a theory of respondeat superior.

1547 Duty of Hospital Employees

Skilled hospital employees, including [*types of skilled hospital employees*], must use reasonable care in providing medical services to patients in the hospital.

Generally, skilled hospital employees are not liable if they follow orders given by the attending physician. If, however, a skilled hospital employee fails to [report changes in a patient's condition][question a physician's orders that do not follow standard medical practice], and the employee's [omission][failure to report or question] is a responsible cause in causing the injury to the patient, then the hospital is liable for the injury.

Comments

A hospital employee's failure to recognize and report abnormalities in the treatment and condition of patients may constitute a breach of the duty of reasonable care. *Poor Sisters of St. Francis v. Catron*, 435 N.E.2d 305 (Ind. Ct. App. 1982) (whether nurses' failure to question and report treatment not in accord with standard medical practice was a breach of hospital's duty of reasonable care was a proper question for the jury).

If a nurse or other hospital employee fails to report changes in a patient's condition and/or to question a doctor's orders when they are not in accord with standard medical practice and the omission results in injury to the patient, the hospital will be liable for its employee's negligence. *Vogler v. Dominguez*, 624 N.E.2d 56 (Ind. Ct. App. 1993).

1548 Contributory Negligence—Definition

Contributory negligence is the failure to use reasonable care.

A person may be negligent by acting or by failing to act. A person is negligent if he or she does something a reasonably careful person would not do in the same situation, or fails to do something a reasonably careful person would do in the same situation.

Reasonable care means being careful and using good judgment and common sense.

Comments

Instruction Nos. 1548 and 1549 should only be given when the defendant claims that the plaintiff-patient was contributorily negligent.

Negligence consists of the failure to use reasonable care, due care, or ordinary care, which is measured by the care a person of reasonable prudence would ordinarily exercise under like conditions and circumstances. *Central Transport, Inc. v. Great Dane Trailers, Inc.*, 423 N.E.2d 675 (Ind. Ct. App. 1981); *Southern Ry. Co. v. Harpe*, 223 Ind. 124, 58 N.E.2d 346 (1944); *Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 38 N.E.2d 257 (1941); *Cleveland, C., C. & S. L. R. Co. v. Jones*, 51 Ind. App. 245, 99 N.E. 503 (1912).

Negligence is comprised of three elements: (1) a duty on the part of the defendant to conform his conduct to the standard of care necessitated by the relationship; (2) a breach of that duty; and (3) injury that the plaintiff suffered as a result of that failure. *Benton v. City of Oakland City*, 721 N.E.2d 224 (Ind. 1999); *Dibortolo v. Metropolitan School Dist.*, 440 N.E.2d 506 (Ind. Ct. App. 1982).

When found to exist, the duty to exercise reasonable care under the circumstances never changes; however, the standard of conduct required to measure up to that duty varies depending upon the particular circumstances. *Franklin v. Benock*, 722 N.E.2d 874 (Ind. Ct. App. 2000). *Clyde E. Williams & Assoc. v. Boatman*, 375 N.E.2d 1138, 1141 (Ind. Ct. App. 1978), discusses the issue of duty in the context of jury instructions:

While it is clear that the trial court must determine if an existing relationship gives rise to a duty, it must also be noted that a factual question may be interwoven with the determination of the existence of a relationship, thus making the ultimate existence of a duty a mixed question of law and fact. This dichotomy presents a trial court with a difficult problem in the drafting of instructions.

In *Clyde E. Williams & Assoc.*, the jury was instructed to consider whether the defendant had a duty, but was not given any direction about how to make that determination. The Court of Appeals stated that "it would be proper to instruct the jury alternatively that if it should find a certain set of facts, then a duty exists; however, should the jury reach a different factual conclusion, then no duty would exist." *Clyde E. Williams & Assoc.*, 375 N.E.2d at 1141. This duty question may arise, for example, in the context of premises liability where certain duties apply based on the status of the person on the property. *Clyde E. Williams & Assoc.*, 375 N.E.2d at 1141.

1549 Contributory Negligence—Burden of Proof

[Defendant] claims [plaintiff]’s own negligence contributed to the [injury][harm] [plaintiff] claims to have suffered and that [plaintiff]’s negligence was a responsible cause of the [injury][harm]. We call negligence of this kind “contributory negligence.”

[Defendant] has the burden of proving by the greater weight of the evidence that [plaintiff] was contributorily negligent.

If you decide that [plaintiff]’s contributory negligence was a responsible cause of [his][her][injury][harm], then [plaintiff] cannot recover damages even if [defendant] was also negligent.

Comments

Contributory negligence is a plaintiff’s conduct that legally contributes to plaintiff’s harm and that falls below the standard of care. *Smith v. Hull*, 659 N.E.2d 185 (Ind. Ct. App. 1995); *Havert v. Caldwell*, 452 N.E.2d 154 (Ind. 1983); *Holtam v. Sachs*, 136 Ind. App. 231, 193 N.E.2d 370 (1963); *Huey v. Milligan*, 242 Ind. 93, 175 N.E.2d 698 (1961); Restatement 2d Torts § 463. To prove contributory negligence, the defendant must show that the plaintiff’s negligent act was a proximate cause of plaintiff’s injury and that plaintiff was actually aware of or should have appreciated the risks involved. *Memorial Hospital of South Bend, Inc. v. Scott*, 261 Ind. 27, 300 N.E.2d 50 (1973).

To constitute a bar to recovery, the patient’s contributory negligence must unite in producing the injury and, thus, be simultaneous and co-operating with the fault of the defendant and enter into the creation of the cause of action. *Sawlani v. Mills*, 830 N.E.2d 932 (Ind. Ct. App. 2005). A patient’s negligence wholly after the doctor’s medical negligence is not a complete defense to recovery for the original injuries, but may mitigate damages. *Sawlani*, 830 N.E.2d 932.

Contributory negligence is not a defense to an action for willful injury. *Hoesel v. Cain*, 222 Ind. 330, 53 N.E.2d 165 (1943). Contributory negligence applies to actions against governmental entities or public employees (Ind. Code ch. 34-13-3), actions against health care providers (Ind. Code art. 34-18), or traditional guest statute (Ind. Code ch. 34-30-11) cases if the guest statute case was filed before the effective date of Indiana’s Comparative Fault Act (1985). Contributory negligence does not apply, however, to cases tried under the Comparative Fault Act (Ind. Code ch. 34-51-2).

1550 Contributory Negligence—Duty to Provide Accurate Information

Patients must use reasonable care in giving health care providers accurate and complete information.

In this case [defendant] claims that [plaintiff] did not give complete and accurate information. If [defendant][has proven][proves] the following by the greater weight of the evidence, then [defendant] is not liable for [plaintiff]'s [injury][harm][death]:

- (1) [plaintiff] failed to give accurate and complete information to the [defendant];
- (2) a reasonably careful person in the same or similar circumstances would have given accurate and complete information to the [defendant]; and
- (3) [plaintiff]'s failure to give accurate and complete information to the [defendant] was a responsible cause in causing [plaintiff]'s [injury][harm][death].

Comments

This instruction applies only where the doctor or dentist is a qualified health care provider and is not subject to suit under the Comparative Fault Act. *See* Ind. Code § 34-51-2-1 (comparative fault act governs any action based on fault that is brought to recover damages for injury or death to a person or harm to property, except as to an action brought against a qualified health care provider for medical malpractice).

The general rule on the issue of the plaintiff's contributory negligence is that the plaintiff must exercise that degree of care that an ordinary reasonable person would exercise in like or similar circumstances. *Faulk v. Northwest Radiologists, P.C.*, 751 N.E.2d 233, 239 (Ind. Ct. App. 2001). Contributory negligence is plaintiff's conduct that contributes as a legal cause to the plaintiff's harm and that falls below the standard to which the plaintiff is required to conform for his or her own protection. *Faulk*, 751 N.E.2d at 239. A patient's contributory negligence operates as a complete defense to medical negligence. *Faulk*, 751 N.E.2d at 239.

To bar recovery in a medical malpractice action, the contributory negligence must be simultaneous with the fault of the physician and enter into the creation of the cause of action. *Faulk*, 751 N.E.2d at 239.

Patients have a duty to give their doctors accurate and complete information. *Fall v. White*, 449 N.E.2d 628 (Ind. Ct. App. 1983).

1551 Contributory Negligence—Duty to Follow Instructions—Bar to Recovery

Patients must use reasonable care in following a [type of health care provider]'s instructions.

In this case [defendant] claims that [plaintiff] did not use reasonable care in following [defendant]'s instructions. If [defendant][has proven][proves] the following by the greater weight of the evidence, then [defendant] is not liable for [plaintiff]'s [injury-][harm][death]:

- (1) [plaintiff] failed to follow reasonable instructions that [defendant] gave before or at the time of the alleged act of medical negligence;
- (2) [plaintiff]'s failure to follow the reasonable instructions occurred while under the ongoing care of [defendant], and was simultaneous and united with the actions of [defendant]; and
- (3) [plaintiff]'s failure to follow [defendant]'s instructions was a responsible cause in causing [plaintiff]'s [injury][harm][death].

Comments

This instruction applies only where the doctor or dentist is a qualified health care provider and is not subject to suit under the Comparative Fault Act. *See* Ind. Code § 34-51-2-1 (comparative fault act governs any action based on fault that is brought to recover damages for injury or death to a person or harm to property, except as to an action brought against a qualified health care provider for medical malpractice).

For a plaintiff's contributory negligence to bar recovery, the plaintiff's failure to follow the defendant physician's instructions must be simultaneous and unite with the fault of the defendant physician to proximately cause the injury. *Wilson v. Lawless*, 64 N.E.3d 838, 846 (Ind. Ct. App. 2016), *transfer denied*, 2017 WL 782670 (Ind. Feb. 23, 2017). Post-malpractice conduct is not contributory negligence that will bar a plaintiff's recovery, but goes instead to the issue of mitigation of damages. *Harris v. Cacdac*, 512 N.E.2d 1138 (Ind. Ct. App. 1987) (where patient's failure to exercise neck after doctor's malpractice constituted contributory negligence appropriate in mitigation of damages.)

The Court of Appeals recently stated, "A patient may not recover in a malpractice action where the patient is contributorily negligent by failing to follow the defendant physician's instructions if such contributory negligence is simultaneous with and unites with the fault of the defendant to proximately cause the injury." *Wilson* at 846.

In order to bar recovery in a medical malpractice action, the contributory negligence must be simultaneous with the fault of the physician and enter into the creation of the cause of action. *Faulk v. Northwest Radiologists, P.C.*, 751 N.E.2d 233, 239 (Ind. Ct. App. 2001). Where the patient failed to have another mammogram as instructed by her doctor, her negligence was wholly subsequent to the doctor's alleged negligence. Therefore, any negligence on the part of the patient was not a bar to recovery. An instruction regarding mitigation of damages based on the patient's subsequent contributory negligence was appropriate. *Sawhani v. Mills*, 830 N.E.2d 932 (Ind. Ct. App. 2005).

1553 Duty to Follow Instructions After Treatment—Mitigation of Damages—Not a Bar to Recovery

A patient must use reasonable care in following a [type of health care provider]'s instructions after being treated to assist in his or her recovery.

In this case [defendant] claims that [plaintiff] did not use reasonable care in following [defendant]'s instructions. If you decide that [defendant] is liable, and you also decide that [defendant][has proven][proves] the following by the greater weight of the evidence:

- (1) [plaintiff] failed to follow reasonable instructions that [defendant] gave after the alleged act of medical negligence; and
- (2) a person using reasonable care in the same or similar circumstances would have followed [defendant]'s instructions; and
- (3) [plaintiff]'s failure to follow the instructions was a responsible cause in contributing to [plaintiff]'s damages,

then you should reduce the amount of money you would otherwise award [plaintiff] by the value of the damages you decide resulted from [plaintiff]'s failure to follow instructions.

Comments

Post-malpractice conduct is not contributory negligence, but rather mitigation of damages. *Harris v. Cacadac*, 512 N.E.2d 1138 (Ind. Ct. App. 1987) (patient's failure to exercise neck after doctor's malpractice).

The affirmative defense of failure to mitigate damages has two elements, both of which the defendant must prove by a preponderance of the evidence: (1) the plaintiff failed to exercise reasonable care to mitigate his or her post-injury damages, and (2) the plaintiff's failure to exercise reasonable care caused the plaintiff to suffer an identifiable item of harm not attributable to the defendant's negligent conduct. *Willis v. Westerfield*, 839 N.E.2d 1179, 1188 (Ind. 2006).

When a defendant seeks a failure to mitigate damages instruction based on a plaintiff's failure to follow a treating doctor's recommendations, whether expert medical opinion testimony is required is to be determined on a case-by-case basis. *Willis v. Westerfield*, 839 N.E.2d 1179, 1182 (Ind. 2006). Expert testimony is required where the question involves medical factors beyond the common knowledge of the layman such that the jury could only speculate in its findings. But where medical matters are within the common experience, observation, or knowledge of laymen, no expert testimony is required. *Willis*, 839 N.E.2d at 1188–89.

1555 Loss of Chance

A [type of health care provider] may be liable to a patient for a loss of chance of survival resulting from the [type of health care provider]'s failure to exercise reasonable care.

To recover damages from [defendant], [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant]'s care and treatment of [plaintiff] fell below the appropriate standard of care;
- (2) if [defendant] had met the appropriate standard of care, [plaintiff] would have had a [chance of survival][chance of avoiding the (describe specific harm)];
- (3) [defendant]'s failure to meet the appropriate standard of care decreased [plaintiff]'s [chance of survival][chance of avoiding the harm]; and
- (4) [defendant]'s failure to meet the appropriate standard of care was a substantial factor in causing the harm to [plaintiff].

In determining the amount of damages to award [plaintiff] for a [loss of chance of survival][loss of chance of avoiding harm], if any, first decide the percentage value of the [lost chance of survival]][lost chance of avoiding harm] to [plaintiff].

To make this determination, consider the evidence presented about:

- (5) [plaintiff]'s percentage [chance of survival][chance of avoiding the harm] before [defendant]'s alleged negligent acts or omissions, and
- (6) [plaintiff]'s percentage [chance of survival][chance of avoiding the harm] after [defendant]'s alleged negligent acts or omissions.

The difference between these percentages is the percentage value of [plaintiff]'s [loss of chance of survival][loss of chance of avoiding harm].

After determining the percentage value of [plaintiff]'s [loss of chance of survival][loss of chance of avoiding harm], determine the value of the total damages based on the evidence presented.

Multiply this dollar amount by the percentage value of [plaintiff]'s lost chance of survival. I will give you a verdict form that will help guide you through this process.

Comments

Where the patient stood less than a 50% chance of recovery prior to encountering the medical negligence, use Instruction No. 1555 and do not use Instruction No. 1513.

The term "loss of chance" has been applied to a number of related situations. These include: (1) an already ill patient suffers a complete elimination of an insubstantial or substantial probability of recovery from a life-threatening disease or condition; (2) a patient survives, but has suffered a reduced chance for a better result or for complete recovery; and (3) a person incurs an increased risk of future harm, but has

no current illness or injury. *Alexander v. Scheid*, 726 N.E.2d 272, 276 (Ind. 2000). This instruction discusses the first situation, in which an already ill patient suffers a complete elimination of a probability of recovery, or in other words, a lost chance of survival. A doctor who renders necessary services is subject to liability for physical harm resulting from his failure to use reasonable care to provide the services, if his failure to use such care results in a lost chance of survival. Restatement 2d Torts § 323.

In *Robertson v. B.O.*, the Supreme Court stated, “*Mayhue, Cahoon, and Herbst* were each wrongful death cases in which the deceased had less than a fifty percent chance of survival even prior to the claimed malpractice. For these types of cases—and only these types of cases—in *Mayhue* we adopted the Restatement (Second) of Torts § 323 (1965) increased risk of harm approach. *Mayhue*, 653 N.E.2d at 1388–89.” 977 N.E.2d 341, 346 (Ind. 2012).

Recoverable damages for a lost chance of survival “are the dollar value of the total harm suffered multiplied by the percentage of the increased risk of harm attributable to the defendant’s negligence.” *Atterholt v. Herbst*, 902 N.E.2d 220, 224 (Ind. 2009) (citing Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353 (1981)); see also *Cutter v. Herbst*, 945 N.E.2d 240 (Ind. Ct. App. 2011) (opinion on calculation of loss of chance damages after remand of *Atterholt*). The Medical Malpractice Act does not change this calculus. *Atterholt*, 902 N.E.2d at 224.

Although *Atterholt* uses the term “increased risk of future harm,” the facts of the case correspond to the elimination of a chance of recovery type of loss of chance, similar to *Mayhue v. Sparkman*, 653 N.E.2d 1384 (Ind. 1995). In *Mayhue*, the already ill patient-plaintiff died from an injury caused by the defendant’s breach of the standard of care. *Alexander*, 726 N.E.2d at 276, also provides additional examples of this type of increased risk of harm: *De Burkarte v. Louvar*, 393 N.W.2d 131, 135, 139–40 (Iowa 1986) (affirming trial court’s damages award to plaintiff whose chances of surviving breast cancer dropped from 50–80% to no chance whatsoever); *Perez v. Las Vegas Medical Ctr.*, 107 Nev. 1, 805 P.2d 589, 592–93 (Nev. 1991) (allowing plaintiff who did not have a greater than 50% chance of surviving brain hemorrhage, even in absence of malpractice, to proceed beyond summary judgment); *Evers v. Dollinger*, 95 N.J. 399, 471 A.2d 405, 407–08 (N.J. 1984) (allowing plaintiff who suffered recurrence of breast cancer between trial and appeal to maintain loss of chance cause of action where doctor’s malpractice caused seven-month delay in diagnosis); *Herskovits v. Group Health Cooperative*, 99 Wn.2d 609, 664 P.2d 474, 475–77 (Wash. 1983) (allowing issue of proximate cause to go to jury where deceased plaintiff’s chance of surviving cancer dropped approximately 14%); see also *Mayhue*, 653 N.E.2d at 1384, 1387–89 (allowing husband of deceased wife to proceed with loss of consortium claim, under Section 323 of the Restatement of Torts, even though experts agreed that wife had less than 50% chance of recovery in absence of defendant’s alleged malpractice).

Increased risk of future harm without current illness or injury is discussed further in Instruction No. 1556. A third type of loss of chance, the reduction of a chance for a better result, is discussed in Instruction No. 1557.

The Indiana Supreme Court has also discussed how significant a cause must be in increased risk of harm cases. The Court held that a plaintiff may bring a medical

negligence claim against a negligent doctor even if the patient had a greater than fifty percent chance of harm in the absence of malpractice. *Atterholt*, 902 N.E.2d 220.

A judge giving this instruction should also give a wrongful death damages instruction, *see* Instruction Nos. 725–735, and should use a verdict form that corresponds to the parties in the action. A sample can be found at Verdict Forms 5051(A), 5051(B), and 5051(C).

1556 Increased Risk of Future Harm

If you decide that [*defendant*] was negligent, and that [*defendant*]'s negligence was a responsible cause of [*plaintiff*]'s risk of future harm, then you must decide the amount of money that will fairly compensate [*plaintiff*] for that increased risk.

[*Plaintiff*]'s increased risk of future harm is the difference between [*plaintiff*]'s risk of harm before and after [*defendant*]'s negligence.

In determining damages for an increased risk of harm, you may consider the medical and statistical evidence the parties have submitted, [the plaintiff's life expectancy], [the chance that a plaintiff will suffer future harm], [and][emotional distress].

The money awarded for these damages is separate from, and must not duplicate, money awarded for any other damages.

Comments

Use Instruction No. 1513 when using this instruction.

Do not use this instruction when Instruction No. 1555 applies.

Increased risk of future harm is an element of damages. A judge giving this instruction should also give a corresponding damages instruction, *see* Instruction No. 716.

In *Alexander v. Scheid*, 726 N.E.2d 272 (Ind. 2000), the Supreme Court of Indiana addressed increased risk of harm. "If a plaintiff seeks recovery specifically for what the plaintiff alleges the doctor to have caused, i.e., the decrease in the patient's probability of recovery, rather than for the ultimate outcome, causation is no longer debatable. . . . Rather, the problem becomes one of identification and valuation or quantification of that injury. We do not view recognizing this injury as a deviation from traditional tort principles. Rather, in this context, it is nothing more than valuation of an item of damages that is routinely valued in other contexts." *Alexander v. Scheid*, 726 N.E.2d at 281.

The Supreme Court further noted: "The jury will have to attach a monetary amount to Plaintiff's loss. In so doing, because this is Plaintiff's action, the jury will be forced to consider what value to ascribe to the privilege of living. In other contexts, juries are routinely entrusted with the task of awarding damages for injuries not readily calculable." *Id.* at 283.

The Court of Appeals, in *Sawlan v. Mills*, 830 N.E.2d 932 (Ind. Ct. App. 2005), found that *Alexander v. Scheid* was applicable. Expert testimony had been presented addressing the plaintiff's increased risk of harm as a result of the delayed diagnosis. There was perhaps a two or three percent overall difference in plaintiff's ten-year chance of survival. The Court of Appeals held that plaintiff was required to prove that the defendant failed to meet the appropriate standard of care by failing to diagnosis the plaintiff's cancer and that this failure caused the increased risk of harm. Thus, traditional proximate cause principles are applicable.

In *Robertson v. B.O.*, the Supreme Court stated, "*Mayhue, Cahoon, and Herbst* were each wrongful death cases in which the deceased had less than a fifty percent chance of survival even prior to the claimed malpractice. For these types of cases—and

only these types of cases—in *Mayhue* we adopted the Restatement (Second) of Torts § 323 (1965) increased risk of harm approach. *Mayhue*, 653 N.E.2d at 1388–89,” 977 N.E.2d 341, 346 (Ind. 2012).

In determining the amount of damages to award a plaintiff, the jury must decide whether the defendant’s negligence caused a decrease in the plaintiff’s life expectancy. *Sawlani v. Mills*, 830 N.E.2d 932. The plaintiff should present evidence of plaintiff’s pre-negligence expectancy and plaintiff’s post-negligence expectancy. It is contemplated that the parties will present medical and statistical evidence to help guide the jury in determining plaintiff’s increased risk of harm.

1557 Reduced Life Expectancy/Loss of Better Result

If you decide that [*defendant*] was negligent, and that [*defendant*]'s negligence was a responsible cause of [*plaintiff*]'s reduction in [chance for a better result][life expectancy], then you must decide the amount of money that will fairly compensate [*plaintiff*] for that reduction.

[*Plaintiff*]'s decreased chance for a better result is the difference between [*plaintiff*]'s chance for a better result before and after [*defendant*]'s negligence.

In determining damages for a decreased chance for a better result, you may consider the medical and statistical evidence the parties have submitted.

The money awarded for these damages is separate from, and must not duplicate, money awarded for any other damages.

Comments

Use Instruction No. 1513 when using this instruction. (Responsible Cause)

Do not use this instruction when Instruction No. 1555 applies.

Reduced life expectancy or loss of chance for a better result is an element of damages. A judge giving this instruction should also give a corresponding damages instruction. *See* Instruction No. 716.

This instruction applies to damages, not responsible cause, as “the patient’s injury is the loss of chance or increased risk of harm and is distinct from causation.” *Sawlani v. Mills*, 830 N.E.2d 932, 940 (Ind. Ct. App. 2005).

In this type of case, the Plaintiff should present evidence of Plaintiff’s pre-negligence life expectancy and Plaintiff’s post-negligence life expectancy; or pre-negligence expected result and post-negligence result. It is contemplated that the parties will present medical and statistical evidence to help guide the jury in determining Plaintiff’s reduction in Plaintiff’s chance for a better result. *See Alexander v. Scheid*, 726 N.E.2d at 283 (Ind. 2000).

1559 Statute of Limitations—General

Indiana law generally provides that a plaintiff must file a claim of medical negligence within two years after a defendant commits medical negligence. There are a few exceptions to this general rule, and [plaintiff] claims one of those exceptions in this case.

To decide whether [plaintiff] filed [his][her] claim within the required period of time, first, you must decide whether, and if so when, [defendant] committed the act of medical negligence.

Next, you must decide when a reasonable person would have discovered the act of medical negligence.

[If you decide that (plaintiff) discovered the medical negligence two years or more after the act of medical negligence, and that the time delay in discovering the negligence was reasonable, you must decide whether (plaintiff) filed this lawsuit within two years from the date (plaintiff) discovered the medical negligence. If so, (plaintiff) filed this lawsuit within the required time period.]

[If you decide that (plaintiff) should have discovered the medical negligence within two years of the act of medical negligence, you must decide whether it was reasonably possible for (plaintiff) to file this lawsuit within two years of the act of medical negligence or, if not, whether (plaintiff) filed it within a reasonable period of time. If so, (plaintiff) filed this lawsuit within the required time period.]

If you decide that [plaintiff] did not file this lawsuit within the required time period, you must decide in favor of [defendant].

Comments

See Ind. Code § 34-18-7-1.

The Committee recommends that this instruction be modified to fit the facts of each case.

As to whether the issues involved in determining compliance with the statute of limitations are questions of fact that should reach the jury, compare *Booth v. Wiley*, 839 N.E.2d 1168, 1177 (Ind. 2005) (reversing trial court's grant of summary judgment when plaintiff learned of the malpractice after the two-year statute of limitations, but filed the lawsuit within eight months of discovering the malpractice; "With respect to any malpractice claims against Dr. Wiley for medical care provided after December 4, 1998, he has not foreclosed the genuine issue of material fact regarding whether it was reasonably possible for the plaintiffs to file within the statutory limitation period after discovery nor, if not, whether the claims were filed within a reasonable time after discovery. As to such claims, it was error to grant Dr. Wiley's motion for summary judgment.") with *Overton v. Grillo*, 896 N.E.2d 499 (Ind. 2008) (affirming trial court's grant of summary judgment when plaintiff learned of the malpractice one year and three months within the two-year statute of limitations, but filed the lawsuit after the statute of limitations) and *Rogers v. Mendel*, 758 N.E.2d 946, 952 (Ind. Ct. App. 2001) ("Whether [the two-year medical negligence statute of limitations] is constitutional as applied is a question of law to

be determined by the trial court on a case-by-case basis. In some instances, this question will be subject to resolution on the basis of undisputed facts, as in the case before us. In other instances, the judge will be required to resolve disputed facts through pre-trial motion practice in order to determine the date upon which the claimant possessed enough information that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and resulting injury.”).

There is some additional confusion about how long a plaintiff has to file her case if she should have discovered the medical negligence after the two-year statute of limitations has run. *Overton* says, “In any event the complaint must be filed within a reasonable time after the trigger date.” *Overton v. Grillo*, 896 N.E.2d at 502 (citing *Herron v. Anigbo*, 897 N.E.2d 444 (Ind. 2008)). *Herron* states, however, “A plaintiff whose trigger date is after the original limitations period has expired may institute a claim for relief within two years of the trigger date.” *Herron*, 897 N.E.2d at 449. The Committee has adopted the approach stated in *Herron*.

Application of the Medical Malpractice Act’s two-year limitations period violated the Open Courts Clause and the Privileges and Immunities Clause of the Indiana Constitution where the patient alleging malpractice suffered from breast cancer, a medical condition with a long latency period which prevented her from discovering, within the limitations period, the physician’s allegedly negligent failure to timely diagnose and treat the illness. *Martin v. Richey*, 711 N.E.2d 1273 (Ind. 1999).

Where medical malpractice plaintiff suffered a medical condition with a long latency period which prevented her from discovering the physician’s allegedly negligent failure to timely diagnose and treat the illness within the limitations period, plaintiffs would be allotted the full two-year statutory period to file a claim, running from the time they discover the malpractice and the resulting injury or facts that, in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury. *Van Dusen v. Stotts*, 712 N.E.2d 491, 497 (Ind. 1999).

The two-year medical malpractice statute of limitations, as applied to a patient and spouse who became aware of the injury 11 months prior to the expiration of limitations period, did not violate the Open Courts Clause of the Indiana State Constitution, as nothing prevented plaintiffs from initiating litigation within the statutory period or attempting to secure a waiver of the limitations period. *Boggs v. Tri-State Radiology*, 730 N.E.2d 692 (Ind. 2000). As long as the statute of limitations does not shorten the window of time so unreasonably that it is impractical for a plaintiff to file a claim at all, as it did in *Martin* and *Van Dusen*, it is constitutional as applied to that plaintiff. *Boggs*, 730 N.E.2d at 692.

1561 Statute of Limitations—Doctrine of Fraudulent Concealment

Indiana law generally provides that a plaintiff must file a claim of medical negligence within two years after a defendant commits medical negligence. There are a few exceptions to this general rule, and [plaintiff] claims one of those exceptions in this case.

A [type of health care provider] must inform a patient of important facts about his or her care and treatment.

If [plaintiff] proves by the greater weight of the evidence that [defendant] failed to inform [plaintiff] of an important fact, then [plaintiff] must have filed this lawsuit within two (2) years of the earliest of:

- (1) The date the [type of health care provider]-patient relationship ends;
- (2) The date [plaintiff] discovers or with reasonable diligence should have discovered the medical negligence.

If, on the other hand, [plaintiff] proves by the greater weight of the evidence that [defendant] actively concealed an important fact with the intent to mislead or hinder [plaintiff] from obtaining information about the medical negligence, then [plaintiff] must have filed this lawsuit within a reasonable time period after the [plaintiff] discovers or with reasonable diligence should have discovered the medical negligence.

If [defendant] proves by the greater weight of the evidence that [plaintiff] did not file [his][her] lawsuit within the required time period, you must decide in favor of [defendant].

Comments

The Committee recommends that this instruction be modified to fit the facts of each case.

Under the doctrine of fraudulent concealment, a person is estopped from asserting the statute of limitations as a defense if that person, by deception or violation of a duty, has concealed material facts from the plaintiff and thereby prevented discovery of a wrong. *Hughes v. Glaese*, 659 N.E.2d 516 (Ind. 1995); *see also Gyn-Ob Consultants, L.L.C. v. Schopp*, 780 N.E.2d 1206, 1210 (Ind. Ct. App. 2003). The doctrine of fraudulent concealment is not an exception to the limitation statute, but constitutes an equitable estoppel. *Weinstock v. Ott*, 444 N.E.2d 1227 (Ind. Ct. App. 1983).

Constructive concealment consists of the failure to disclose material information to the patient; active concealment involves affirmative acts of concealment intended to mislead or hinder the plaintiff from obtaining information concerning the malpractice. *Hughes*, 659 N.E.2d at 521 (quoting *Keesling v. Baker & Daniels*, 571 N.E.2d 562 (Ind. Ct. App. 1991)); *see also Weinstock*, 444 N.E.2d 1227 (because of fiduciary nature of the doctor-patient relationship, doctor has a duty to disclose material information to patient, and failure to do so is fraudulent concealment).

If the concealment is active, the statute of limitations is tolled until the patient discovers the malpractice, or in the exercise of due diligence should discover it; if

the concealment is constructive, the statute of limitations is tolled until the termination of the physician-patient relationship, or until discovery, whichever is earlier. *Hughes*, 659 N.E.2d at 521. Under either strand of the doctrine, the patient must bring his or her claim within a reasonable period of time after the statute of limitations begins to run. *Hughes*, 659 N.E.2d at 521.

A tortfeasor's fraud can toll the statutory filing period of a non-claim statute, such as a wrongful death action.

The Fraudulent Concealment Statute applies to toll the two-year statutory period to file a wrongful death claim.

Neither an ordinary statute of limitation nor a temporal condition precedent will bar a plaintiff's claim when the delay in filing was due to the tortfeasor's fraud.

Ind. Code § 34-11-5-1 states:

"If a person liable to an action conceals the fact from the knowledge of the person entitled to bring the action, the action may be brought at any time within the period of limitation after the discovery of the cause of action."

Estate of Hargis v. The Good Samaritan Home, Inc., 9 N.E.3d 1257 (Ind. 2014).

1563 Statute of Limitations—Continuing Wrong—Course of Conduct

Indiana law generally provides that a plaintiff must file a claim of medical negligence within two years after a defendant commits medical negligence. Medical negligence may consist of a single act that produces an injury or an entire course of conduct over time that produces an injury.

If:

- (1) the [*defendant*]'s course of conduct failed to meet the standard of reasonable care and skill; and
- (2) the [*defendant*]'s course of conduct was a responsible cause in causing [*plaintiff*]'s injury,

then the two (2) year period during which [*plaintiff*] must have filed this lawsuit began when the course of conduct ended.

Comments

Indiana law generally provides that a plaintiff must file a claim of medical negligence within two years after a defendant commits medical negligence. *See* Ind. Code § 34-18-7-1. Where the medical negligence consists of a course of conduct over time, the two year period during which the plaintiff must file a lawsuit begins when the course of conduct ends. *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 699 (Ind. 2000).

The doctrine of continuing wrong states that, when an entire course of conduct combines to produce an injury, the statute of limitations does not begin to run until the wrongful act ceases, and at that point the plaintiff may bring the claim within the normal statutory period. *Boggs*, 730 N.E.2d at 699. The doctrine is not equitable; rather, it defines when an act, omission, or neglect took place. *Id.*; *see also Ferrell v. Geisler*, 505 N.E.2d 137 (Ind. Ct. App. 1987; *Frady v. Hedgcock*, 497 N.E.2d 620 (Ind. Ct. App. 1986) (refilling of prescriptions is a continuing wrong).

1565 Statute of Limitations—Failure to Diagnose

Indiana law generally provides that a plaintiff must file a claim of medical negligence within two years after a defendant commits medical negligence. Medical negligence may consist of a failure to diagnose.

If:

- (1) the [defendant] failed to diagnose [plaintiff]'s [disease][condition]; and if
- (2) the [defendant]'s failure to diagnose breached the standard of reasonable care and skill;

then the two (2) year period during which [plaintiff] must have filed this lawsuit began when [defendant] last treated [plaintiff].

Comments

The doctrine of continuing wrong states that, when an entire course of conduct combines to produce an injury, the statute of limitations does not begin to run until the wrongful act ceases, and at that point the plaintiff may bring the claim within the normal statutory period. *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 699 (Ind. 2000). The doctrine is not equitable; rather, it defines when an act, omission, or neglect took place.

Id.; see also *Ferrell v. Geisler*, 505 N.E.2d 137 (Ind. Ct. App. 1987; *Frady v. Hedgcock*, 497 N.E.2d 620 (Ind. Ct. App. 1986) (refilling of prescriptions is a continuing wrong).

When the sole claim of medical malpractice is a failure to diagnose, the omission cannot as a matter of law extend beyond the time the physician last rendered a diagnosis. *Hopster v. Burgeson*, 750 N.E.2d 841, 858 (Ind. Ct. App. 2001); see also *LeBrun v. Conner*, 702 N.E.2d 754, 758 (Ind. Ct. App. 1998) (optometrist's alleged continuing wrong in failing to diagnose and monitor a patient's glaucoma ceased, and the statute of limitations on a malpractice claim commenced, on the last date the optometrist treated the patient).

1567 Physicians—Battery

A [type of health care provider] who physically contacts a patient's body without the patient's consent commits battery—even if the [type of health care provider] uses the required skill and care in treating the patient.

A [type of health care provider] also commits battery if:

- (1) a patient agreed to a certain treatment;
- (2) the [type of health care provider] provided a different treatment than the treatment to which the patient consented;
- (3) the different treatment included contact with the patient's body; and
- (4) the patient did not consent to the different treatment.

Comments

A doctor's failure to obtain any consent at all is a battery. *See Spar v. Cha*, 907 N.E.2d 974, 979 (Ind. 2009). Failure to obtain *informed* consent is regarded as a specific form of negligence for breach of the required standard of professional conduct. *Spar*, 907 N.E.2d at 979. Thus, if plaintiff only claims lack of informed consent, a judge should give Instruction No. 1529 and not this instruction. If a plaintiff claims a complete lack of consent *and* informed consent, a judge should give both Instruction No. 1529 and this instruction. When a judge gives this instruction, the Committee also recommends Instruction No. 3141, which defines battery.

Surgery to which the patient did not consent is in the nature of a battery and is malpractice. *Bowman v. Beghin*, 713 N.E.2d 913, 917 (Ind. Ct. App. 1999).

A jury is capable, without expert opinion, of deciding the truth of a patient's claim that he would not have consented to the surgery without the misrepresentations of what procedure would be done. *Bowman*, 713 N.E.2d at 917.

1569 Good Samaritan

In general, a person who is confronted with an emergency or accident and gives free emergency care in good faith is immune from civil liability for any personal injury that results from the person's act or failure to act:

- (1) in providing the emergency care; or
- (2) in providing or arranging for further medical treatment or care for the injured person.

However, a person is liable if his or her act or failure to act amounts to gross negligence or willful or wanton misconduct.

Comments

Indiana Code § 34-30-12-1 discusses immunity for free emergency care. *See also* Ind. Code §§ 34-30-12-2 (resuscitation); 34-30-13-1 (free voluntary health care).

The general rule of immunity does not apply to services rendered by a health care provider in a health care facility. Ind. Code § 34-30-12-1(a).

Willful or wanton misconduct is defined in Instruction No. 1111. Gross negligence is generally defined as a conscious, voluntary act or omission in reckless disregard of the consequences to another party. *Northern Ind. Pub. Serv. v. Sharp*, 790 N.E.2d 462, 465 (Ind. 2003).

1571(A) Mixed Comparative Fault and Common Law Defendants—If All Parties Agree—Judge Calculates Judgment Against Each Defendant

To decide if [plaintiff] is entitled to recover damages from [comparative fault defendant] or [common law defendant] or both, and if so, the amount of those damages, apportion the fault of [plaintiff], [defendants], and [identified nonpart(y)(ies)] on a percentage basis. Do this as follows:

First, if neither [comparative fault defendant] nor [common law defendant] is at fault, return your verdict for [comparative fault defendant] and [common law defendant], and against [plaintiff], and deliberate no further. (Use Verdict Form 5003(A).)

If either [comparative fault defendant] or [common law defendant] is at fault, decide their percentages of fault, and the percentage of fault, if any, of [plaintiff] and [identified nonpart(y)(ies)] that caused [plaintiff]’s injuries. These percentages must total 100 percent. Do not apportion fault to any other person or entity.

Finally, decide the total amount of [plaintiff]’s damages, if any. Do not consider fault when you decide this amount. (Use Verdict Form 5004.)

Based on the law, the percentages of fault you allocate, and the total amount of damages in your verdict, I will calculate the amount of money, if any, [plaintiff] is entitled to recover against either of the defendants.

The law treats these defendants differently. The law requires that:

- (1) If [plaintiff]’s fault is greater than 50 percent, [plaintiff] cannot recover damages against either [comparative fault defendant] or [common law defendant].
- (2) If [plaintiff]’s fault is greater than 0 percent, [plaintiff] cannot recover damages against [common law defendant].

I will give you verdict forms that will help guide you through this process.

Comments

Ind. Code § 34-51-2-8 provides the manner in which the jury is to determine damages in a comparative fault case. When comparative fault principles collide with common law negligence principles, determining damages becomes exceedingly complicated and confusing for the jury. In cases involving both comparative fault and common law negligence defendants, therefore, it is recommended that the parties agree that the trial judge will calculate the damages against each defendant. If the parties so agree, this Instruction, along with Verdict Forms 5003(A) and 5004, should be given.

The parties and the judge should attempt to reach this agreement well before trial to avoid the problems of trying cases involving both sets of principles in a single trial. If the parties do not agree that the judge should calculate the damages against each defendant, the judge should instruct the jury using Instruction No. 944(B).

1571(B) Mixed Comparative Fault and Common Law Defendants

The law requires you to use different methods to decide if [plaintiff] is entitled to recover damages from [comparative fault defendant] or [common law defendant] or both, and if so, the amount of those damages.

Deliberations as to [common law defendant]	Deliberations as to [comparative fault defendant]
<p>If you decide that [common law defendant] was not negligent, or that [common law defendant] was negligent, but that [his][her][its] negligence was not a responsible cause of [plaintiff]’s injury, return your verdict for [common law defendant], and against [plaintiff], and deliberate no further as to [common law defendant]. (Use Verdict Form 5017.)</p> <p>If you decide that [plaintiff]’s own negligence contributed to the [injury][harm][plaintiff] claims to have suffered and that [plaintiff]’s negligence was a responsible cause of the [injury][harm], return your verdict for [common law defendant] and against [plaintiff] in this case, and deliberate no further as to [common law defendant]. (Use Verdict Form 5017.)</p> <p>However, if you decide that [common law defendant] was negligent, and that [plaintiff]’s own negligence did not contribute to the [injury][harm], then you must decide the amount of plaintiff’s damages caused by the negligence of [common law defendant] without comparing that negligence to the fault of any other defendant in this case. Return your verdict against [common law defendant] in that amount. (Use Verdict Form 5013.)</p>	<p>If you decide that [comparative fault defendant] is not at fault, or that [comparative fault defendant] was at fault, but that [his][her][its] fault was not a responsible cause of [plaintiff]’s injury, return your verdict for [comparative fault defendant], and against [plaintiff], and deliberate no further as to [comparative fault defendant]. (Use Verdict Form 5001(A).)</p> <p>If [comparative fault defendant] is at fault, decide [his][her][its] percentage of fault, and the percentage of fault, if any, of [plaintiff], [common law defendant], and [identified nonpart(y)(ies)] that caused [plaintiff]’s injuries. These percentages must total 100 percent. Do not apportion fault to any other person or entity.</p> <p>If [plaintiff]’s fault is greater than 50 percent, return your verdict for [comparative fault defendant] and against [plaintiff] in this case; and deliberate no further. (Use Verdict Form 5003(B).) However, if you decide that [plaintiff]’s fault is 50 percent or less,</p> <p>(1) Decide the total amount of [plaintiff]’s damages, if any. Do not consider fault when you decide this amount.</p> <p>(2) Multiply [plaintiff]’s total damages by [comparative fault defendant]’s percentage of fault.</p> <p>(3) Return your verdict for [plaintiff] and against [comparative fault defendant] in the amount of the product of that multiplication. (Use Verdict Form 5003(C).)</p>

I will give you verdict forms that will help guide you through this process.

Comments

When comparative fault principles collide with common law negligence principles, determining damages becomes exceedingly complicated and confusing for the jury. In cases involving both comparative fault and common law negligence defendants, therefore, it is recommended that the parties agree that the trial judge will calculate

the damages against each defendant. Instruction No. 944(A) was designed to be used when the parties so agree. The parties and the judge should attempt to reach this agreement well before trial to avoid the problems of trying cases involving both sets of principles in a single trial.

If the parties do not agree that the judge should calculate the damages against each defendant, the judge should instruct the jury using this Instruction.

CHAPTER 1700

PROFESSIONAL NEGLIGENCE

SYNOPSIS

- 1701 Issues for Trial; Burden of Proof
- 1703 Duty of Attorney
- 1707 Legal Negligence—Elements
- 1709 Burden of Proof for Plaintiff's Fault in a Comparative Fault Case
- 1711 Comparative Fault—Definition
- 1713 Responsible Cause (Proximate Cause)—Definition
- 1714 Foreseeable—Defined
- 1715 Delegation of Duty
- 1717 Standard of Care—Expert Opinion

1701 Issues for Trial; Burden of Proof

The Plaintiff, _____, sued _____, the Defendant.

[*Plaintiff*] claims that [*defendant*][*insert claimed action(s)*]. [*Plaintiff*] must prove [his][her][its] claims by the greater weight of the evidence.

[*Defendant*] denies [*plaintiff*]'s claims. [*Defendant*] is not required to disprove [*plaintiff*]'s claims.

[*Defendant*] has claimed certain defenses. [*Defendant*] must prove [his][her][its] defense[s] of [*specify affirmative defense(s)*] by the greater weight of the evidence.

[(*Plaintiff*) also claims (he)(she)(it) is entitled to an award of punitive damages because (*insert brief statement of claim for punitive damages*). (*Plaintiff*) must prove this claim by clear and convincing evidence.]

Comments

This instruction should be modified to set forth all claims, counterclaims, and cross claims.

Jury Rule 20 and Trial Rule 51(A) require that the trial court give preliminary instructions as to the issues for trial and the burden of proof. The trial court and counsel should carefully prepare a preliminary instruction setting out the issues for trial in narrative form, including all claims, counterclaims, and cross claims. The instruction should be brief, accurate, conversational, and as non-technical as possible.

If a pretrial order has been entered, *see* T.R. 16(J), the Committee recommends that the instruction be drafted based on that order, which supplants the allegations in the pleadings, but should not be rigidly or pointlessly applied. *See Vlach v. Goode*, 515 N.E.2d 569 (Ind. Ct. App. 1987); 62 Am. Jur. 2d PreTrial Conference § 29 at 661 (1972).

Whether a pretrial order has been entered or not, the Committee recommends against reading the pleadings to the jury.

1703 Duty of Attorney

In providing legal services, an attorney must use the degree of care and skill that a reasonably careful, skillful, and prudent attorney would use under the same or similar circumstances.

[Unless stated or otherwise agreed, an attorney must use the same degree of care and skill that other attorneys practicing in the same field of law would use under the same or similar circumstances.]

An attorney who uses sound judgment and ordinary care and skill in representing a client, is not responsible for the outcome of the case.

Comments

An attorney has a duty to use ordinary care, skill, and diligence. *Anderson v. Anderson*, 399 N.E.2d 391 (Ind. Ct. App. 1979).

The Comparative Fault Act generally applies to legal malpractice claims. See *Solnosky v. Goodwell*, 892 N.E.2d 174 (Ind. Ct. App. 2008). Judges using these professional malpractice instructions should also use the instructions on comparative fault.

Legal malpractice actions are governed by the two (2) year statute of limitations in Ind. Code § 34-11-2-4. *Shideler v. Dwyer*, 275 Ind. 270, 417 N.E.2d 281 (1981). The statute begins to run when the breaching act meets the damage. *Johnson v. Cornett*, 474 N.E.2d 518 (Ind. Ct. App. 1985).

See *Fiddler v. Hobbs*, 475 N.E.2d 1172 (Ind. Ct. App. 1985) (on client's dissatisfaction for attorney not getting client's desired outcome); see also 3 I.L.E. Attorney and Client § 74, at 449-50.

The existence of a conflict of law does not automatically render an attorney's action or inaction as not negligent. Instead, it is for the jury to determine, given the then-existing conflict of case law, whether the attorney breached his duty by failing to exercise ordinary skill and knowledge. *Oxley v. Lenn*, 819 N.E.2d 851, 857 (Ind. Ct. App. 2004).

Many states, Indiana is not one of them, have adopted the rule under which an attorney's mere error in judgment cannot support a legal malpractice claim. In Indiana, an attorney is generally required to exercise ordinary skill and knowledge. In order to succeed in a legal malpractice claim the plaintiff must prove, among other things, that the attorney breached that duty. As for "judgmental immunity," whether a state has adopted the attorney judgment rule or not, those that have addressed the issue of legal research or lack thereof as malpractice have found that an attorney's duty to his client encompasses knowledge of the law and an obligation to perform diligent research and provide informed judgments. *Clary v. Lite Machs. Corp.*, 850 N.E.2d 423, 432 (Ind. Ct. App. 2006).

1707 Legal Negligence—Elements

To recover damages from [defendant], [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] had a duty to use ordinary skill and knowledge in representing [plaintiff];
- (2) [defendant] did not use ordinary skill and knowledge in representing [plaintiff];
- (3) [plaintiff] was damaged; and
- (4) [defendant]'s failure to use ordinary skill and knowledge was a responsible cause of [plaintiff]'s damages.

Comments

To establish causation and the extent of harm in a legal malpractice case, the client must show that the outcome of the underlying litigation would have been more favorable but for the attorney's negligence. *Barkal v. Gouveia & Associates*, 65 N.E.3d 1114, 1119 (Ind. Ct. App. 2016).

The elements of legal malpractice are (1) employment of an attorney, which creates a duty to the client; (2) failure of the attorney to use ordinary skill and knowledge (breach of duty); and (3) that such negligence was the proximate cause of (4) damage to the plaintiff. *Mundia v. Drendall Law Office*, 77 N.E.3d 846, 853 (Ind. Ct. App. 2017). *DiBenedetto v. Devereux*, 78 N.E.3d 1117, 1121 (Ind. Ct. App. 2017).

1709 Burden of Proof for Plaintiff's Fault in a Comparative Fault Case

[Defendant] claims [plaintiff]'s own fault contributed to the [injury][harm][plaintiff] claims to have suffered and that [plaintiff]'s fault was a responsible cause of the [injury][harm].

[Defendant] has the burden of proving by the greater weight of the evidence that [plaintiff] was at fault.

Comments

The Committee believes that the Comparative Fault Act, Ind. Code ch. 34-51-2, retained the prior common law negligence rule that the defendant has the burden to prove plaintiff's contributory negligence. See *Koziol v. Vojvoda*, 662 N.E.2d 985 (Ind. Ct. App. 1996).

Professional
Negligence

1711 Comparative Fault—Definition

You must decide this case according to the Indiana law of comparative fault. The term “fault” refers to conduct that makes a person responsible, in some degree, for [a death][an injury][property damage]. The type[s] of fault at issue [is][are][*name types of fault at issue*].

Comments

This instruction should be used to inform the jury of the specific type of fault (*i.e.*, negligence) at issue in the action.

The Comparative Fault Act, Ind. Code ch. 34-51-2, contemplates that all types of fault be compared. Fault includes “any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.” Ind. Code § 34-6-2-45(b).

Enactment of a comparative fault statute which subjects a broad range of negligent conduct, even willful and wanton misconduct, to comparative treatment, reflects a legislative determination that fairness is best achieved by a relative assessment of the parties’ respective conduct. *Booker, Inc. v. Morrill*, 639 N.E.2d 358 (Ind. Ct. App. 1994).

Under the Comparative Fault Act, the definition of “fault” includes the unreasonable failure to avoid an injury or mitigate damages. For a discussion on the failure to mitigate damages as fault, *see Medlock v. Blackwell*, 724 N.E.2d 1135 (Ind. Ct. App. 2000); *Deible v. Poole*, 691 N.E.2d 1313 (Ind. Ct. App. 1998), *adopted by* 702 N.E.2d 1076 (Ind. 1998).

As of July 1, 1995, product liability cases fall under comparative fault analysis, although the definition of “fault” for purposes of product liability cases differs from the definition of fault in the Comparative Fault Act. *Compare* Ind. Code § 34-6-2-45 *with* Ind. Code § 34-20-8-1.

Indiana Code § 34-6-2-45(b) specifies that the Comparative Fault Act covers all types of fault (including intentional acts); thus instructions for cases involving both negligent and intentional acts can include the comparative fault verdict forms, which can name the intentional actors as parties or nonparties, depending on the circumstances of the case.

1713 Responsible Cause (Proximate Cause)—Definition

A person's conduct is legally responsible for causing [an injury][property damage][a death] if:

- (1) the [injury][property damage][a death] would not have occurred without the conduct, and
- (2) the [injury][property damage][a death] was a natural, probable, and foreseeable result of the conduct.

This is called a "responsible cause."

[There can be more than one responsible cause for an injury.]

Comments

Scholars identify the use of legal jargon and arcane legalese as the most serious flaws of contemporary jury instructions. John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1209 (2002). In fact, in one study of 14 jury instructions, the proximate cause instruction produced proportionally the most misunderstanding among laypersons. The study revealed that jurors mistake "proximate cause" for "approximate cause," "estimated cause," or some fabrication. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979); see also Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L.J. 456, 468 (1962) ("proximate cause" is frequently misinterpreted to mean "probable" or "approximate cause"); James D. Wascher, *The Importance of Juries: The Long March Toward Plain English Jury Instructions*, 19 Chicago Bar Ass'n Record 50, 50-51 (2005) (a Chicago judge reported that he presided over a trial in which the jury sent him a note asking whether proximate cause meant "it's pretty close to the cause").

Prosser and Keeton say that proximate cause is "is an unfortunate word, which places entirely the wrong emphasis on the factor of physical or mechanical closeness." Prosser & Keeton, *The Law of Torts* § 42. They even imply that it was a sin to have coined the term "proximate cause" in the first place. Prosser & Keeton, *The Law of Torts* § 42. ("The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins.") The Committee has determined that use of a term so likely to be misunderstood is against the policy behind clear jury instructions.

There are two types of causation in a negligence case—causation in fact and proximate cause. See, e.g., Prosser & Keeton, *The Law of Torts* §§ 41 (causation in fact), 42 (proximate cause) (5th ed. 1984). Causation in fact is the threshold question of whether "but for" the defendant's negligent conduct, plaintiff's harm would not have occurred. Or, to put it another way, plaintiff's harm would not have occurred without the defendant's negligent conduct. *Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981) (citing W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971); 21 I.L.E. Negligence § 62 (1959)). Because the consequences of an act go forward to eternity and back before the dawn of human events, there must also be "some reasonable connection between the act or omission

of the defendant and the damage which the plaintiff has suffered,” Prosser & Keeton, *The Law of Torts* § 41. This is proximate cause, and it boils down to “whether the conduct has been so significant and important a cause that the defendant should be legally responsible.” Prosser & Keeton, *The Law of Torts* § 41. Prosser and Keeton therefore suggest that either “responsible cause” or “legal cause” would be a more appropriate term. Prosser & Keeton, *The Law of Torts* § 41. Because use of the term “legal cause” might suggest to the jury that there could also be an “illegal cause,” the Committee selected “responsible cause.”

The Indiana Supreme Court has held that a proximate cause instruction is not *required* to refer to “but for” causation, “so long as the instructions as a whole adequately convey the law in this area.” *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 301 (Ind. 2009). To ensure that the instructions as a whole *do* adequately convey both proximate cause and causation in fact, the Committee has included both concepts in this one instruction. Subpart (1) of the instruction (“the injury would not have occurred without the conduct”) instructs on causation in fact. And because the Indiana Supreme Court has explained proximate cause as the natural and probable consequence of the conduct, subpart (2) of the instruction (“the injury was a natural and probable result of the conduct”) instructs on proximate cause. “A negligent act is said to be the proximate cause of an injury ‘if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.’ ” *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003) (quoting *Bader v. Johnson* 732 N.E.2d 1212, 1218 (Ind. 2000)).

Plaintiff in a negligence action has the burden of proving causation in fact by a preponderance of the evidence. *Turner v. Davis*, 699 N.E.2d 1217 (Ind. Ct. App. 1998) (causation in fact); *Carter v. Aetna Life Ins. Co.*, 217 Ind. 282, 27 N.E.2d 75 (1940) (proximate cause). What is the proximate cause of the injury is ordinarily a question of fact for the jury that becomes a question of law when only a single conclusion can be drawn from the facts. *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101 (Ind. Ct. App. 1999).

The court is not required to repeat the substance of an instruction defining proximate cause, and outlining the necessity of establishing it, in every general instruction relating to the subject of negligence. *Swallow Coach Lines, Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938).

The “conduct” discussed in this Instruction includes acts and omissions. *See, e.g.*, Instruction Nos. 909 and 1107.

There can be more than one responsible cause for an injury. *See, e.g.*, *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006) (“An injury may have more than one proximate cause.”); *Board of Comm’rs v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992) (“There may be more than one proximate cause of an event.”); *Krohn v. Shidler*, 140 Ind. App. 175, 185 (1966) (“It is not necessary that such negligence be the sole proximate cause.”). The bracketed sentence about multiple responsible causes should be given when it is an issue in the case.

1714 Foreseeable—Defined

[An injury][Property damage][A death] is “foreseeable” when a person should realize that [his][her] act or failure to act might cause that harm.

Comments

In the context of proximate/responsible cause, the question is whether the injury “is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.” *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 108 (Ind. 2002) (citing *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000)). “The determination of what is reasonably foreseeable is not judged by the subjective opinions of those involved, but is based upon the standard of due care in avoiding a result which might reasonably have been anticipated in the ordinary experience of people.” *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 917–18 (Ind. Ct. App. 2001) (citing *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101, 1105 (Ind. Ct. App. 1999)). When some harm is foreseeable, a person is responsible for any injury even if the extent of the injury was unforeseeable. *Bolin v. Wingert*, 764 N.E.2d 201, 207–08 (Ind. 2002). “If the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor’s negligence.” *Hampton v. Moistner*, 654 N.E.2d 1191, 1194 (Ind. Ct. App. 1995).

1715 Delegation of Duty

An attorney has a duty to use reasonable care and skill in representing his or her client and cannot delegate that duty to an employee. An attorney is responsible for the acts and failures to act of his or her employees.

Comments

A partner in a law firm is responsible for another lawyer's violation of the Rules of Professional Conduct if the other lawyer practices in the firm or is under the direct supervision of the partner, if the partner knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action. *In re Galloway*, 729 N.E.2d 574, 575 (Ind. 2000); *see also* Ind. Prof. Cond. R. 5.1. If a firm operates as a professional corporation (not a partnership), the attorneys are not liable for the acts of each other. *Monon Corp. v. Townsend, Yosha, Cline & Price*, 678 N.E.2d 807, 811 (Ind. Ct. App. 1997); *see also* 1 Ronald E. Mallen & Jeffery M. Smith, *Legal Malpractice* § 5.5 Employees and Agents (3d ed. 1989).

1717 Standard of Care—Expert Opinion

In deciding whether [*defendant*] used reasonable care and skill in representing [*plaintiff*], you must consider only the expert testimony of attorneys.

Comments

With regard to the question of whether an attorney exercised due care and diligence in his representation of the client in the underlying case, Indiana law requires “expert testimony” to demonstrate the standard of care by which the attorney’s conduct is measured. *Barkal v. Gouveia & Associates*, 65 N.E.3d 1114, 1119 (Ind. Ct. App. 2016).

While the common knowledge exception is a generally accepted deviation from the requirement of expert testimony in a legal malpractice case, it is very limited and applies solely in cases of obvious and transparent malpractice. In *Storey v. Leonas*, 904 N.E.2d 229, 238 (Ind. Ct. App. 2009), we characterized the exception as “when the question is within the common knowledge of the community as a whole or when an attorney’s negligence is so grossly apparent that a lay person would have no difficulty in appraising it.” *Barkal*, 65 N.E.3d at 1122.

There is some authority that a plaintiff suing for medical or professional malpractice can call the defendant as a witness, ask him about the standard of care, and then impeach him as an expert. *Linton v. Davis*, 887 N.E.2d 960 (Ind. Ct. App. 2008). In *Linton*, the plaintiff called the defendant-doctor to testify during her case in chief. During her questioning, the plaintiff asked whether the defendant believed he adhered to the standard of care. He did not object, so any error caused by the question was waived. The Court of Appeals then went on to state in *dicta*, “Waiver notwithstanding, we conclude [the plaintiff] could properly question [the defendant] as to the standard of care and his opinion as to whether he met that standard. *Linton*, 887 N.E.2d at 968. Then the Court of Appeals stated that, because the doctor was being questioned as to the standard of care, he was testifying as an expert, and as an expert and as such could be impeached with his licensure status.

For more information on expert testimony in the medical malpractice context, see Instruction No. 1539 cmt.

CHAPTER 1900

PREMISES LIABILITY/ANIMALS

SYNOPSIS

A. Premises Liability

- 1901 Issues for Trial; Burden of Proof
- 1903 Burden of Proof for Plaintiff's Fault in a Comparative Fault Case
- 1905 Comparative Fault—Definition
- 1907 Reasonable Care—Definition
- 1909 Responsible Cause (Proximate Cause)—Definition
- 1910 Foreseeable—Defined
- 1911 Status and Duty in General
- 1912 Possessor of Land
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- 1915 Duty to Trespasser (Adults)
- 1917 Trespasser—Elements and Burden of Proof (Adults)
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- 1921 Duty to Licensee
- 1923 Licensee—Elements and Burden of Proof
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- 1927 Invitation—Express or Implied
- 1928 Duty of Invitee
- 1929 Duty to Invitee—Conditions on the Land
- 1930 Assumption Property is Reasonably Safe for Use
- 1931 Invitee—Elements and Burden of Proof—Conditions on the Land
- 1932(A) Duty to Invitee—Elements and Burden of Proof—Activity on the Land
- 1932(B) Duty to Invitee—Elements and Burden of Proof—Third Parties' Criminal Acts
- 1933 Attractive Nuisance
- 1935 Attractive Nuisance—Burden of Proof
- 1937 Duty of [Owner's][Occupant's] Real Estate Agent to Prospective Buyer
- 1939 Control of Common Areas
- 1941 Hidden Defects—Common Law

- 1943 Highways, Streets, and Sidewalks—Duty of Governmental Entity
- 1945 Duty in General—Plaintiff on Premises of Non-profit Religious Organizations with Actual or Implied Permission
- 1947 Duty in General—Plaintiff on Premises of Non-profit Religious Organization Without Actual or Implied Permission
- 1949 Duty—Non-profit Religious Organizations—Childcare Services
- 1951 Permission or Consent—Express or Implied—Non-profit Religious Organizations

B. Animals

- 1953 Domestic Animals—General Duty
- 1954 Domestic Animals—Negligent Containment
- 1955 Domestic Animals—Known to be Dangerous
- 1956 Strict Liability for Some Unprovoked Dog Bites
- 1957 Inherently Dangerous Animals

A. Premises Liability

1901 Issues for Trial; Burden of Proof

The Plaintiff, _____, sued _____, the Defendant.

[*Plaintiff*] claims that [*defendant*][*insert claimed action(s)*]. [*Plaintiff*] must prove [*his*][*her*][*its*] claims by the greater weight of the evidence.

[*Defendant*] denies [*plaintiff*]'s claims. [*Defendant*] is not required to disprove [*plaintiff*]'s claims.

[*Defendant*] has claimed certain defenses. [*Defendant*] must prove [*his*][*her*][*its*] defense[s] of [*specify affirmative defense(s)*] by the greater weight of the evidence.

[(*Plaintiff*) also claims (he)(she)(it) is entitled to an award of punitive damages because (*insert brief statement of claim for punitive damages*). (*Plaintiff*) must prove this claim by clear and convincing evidence.]

Comments

This instruction should be modified to set forth all claims, counterclaims, and cross claims.

Jury Rule 20 and Trial Rule 51(A) require that the trial court give preliminary instructions as to the issues for trial and the burden of proof. The trial court and counsel should carefully prepare a preliminary instruction setting out the issues for trial in narrative form, including all claims, counterclaims, and cross claims. The instruction should be brief, accurate, conversational, and as non-technical as possible.

If a pretrial order has been entered, *see* T.R. 16(J), the Committee recommends that the instruction be drafted based on that order, which supplants the allegations in the pleadings, but should not be rigidly or pointlessly applied. *See Vlach v. Goode*, 515 N.E.2d 569 (Ind. Ct. App. 1987), *reh'g denied, trans. denied*; 62 Am. Jur. 2d PreTrial Conference § 29 at 661 (1972).

Whether a pretrial order has been entered or not, the Committee recommends against reading the pleadings to the jury.

1903 Burden of Proof for Plaintiff's Fault in a Comparative Fault Case

[Defendant] claims [plaintiff]'s own fault contributed to the [injury][property damage][death][plaintiff] claims to have suffered and that [plaintiff]'s fault was a responsible cause of the [injury][harm].

[Defendant] has the burden of proving by the greater weight of the evidence that [plaintiff] was at fault.

Comments

The Committee believes that the Comparative Fault Act, Ind. Code ch. 34-51-2, retained the prior common law negligence rule that the defendant has the burden to prove plaintiff's contributory negligence. *See Koziol v. Vojvoda*, 662 N.E.2d 985 (Ind. Ct. App. 1996).

1905 Comparative Fault—Definition

You must decide this case according to the Indiana law of comparative fault. The term “fault” refers to conduct that makes a person responsible, in some degree, for [injury][property damage][death]. The type[s] of fault at issue [is][are][*name types of fault at issue*].

Comments

This instruction should be used to inform the jury of the specific type of fault (*i.e.*, negligence) at issue in the action.

The Comparative Fault Act, Ind. Code ch. 34-51-2, contemplates that all types of fault be compared. Fault includes “any act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term also includes unreasonable assumption of risk not constituting an enforceable express consent, incurred risk, and unreasonable failure to avoid an injury or to mitigate damages.” Ind. Code § 34-6-2-45(b). Failure to mitigate damages for the purpose of determining Fault refers only to actions a plaintiff could have taken *before* the accident—such as wearing safety goggles—not to a plaintiff’s failure to mitigate damages after the accident. *Kocher v. Getz*, 824 N.E.2d 671, 674–75 (Ind. 2005).

Enactment of a comparative fault statute which subjects a broad range of negligent conduct, even willful and wanton misconduct, to comparative treatment, reflects a legislative determination that fairness is best achieved by a relative assessment of the parties’ respective conduct. *Booker, Inc. v. Morrill*, 639 N.E.2d 358 (Ind. Ct. App. 1994).

As of July 1, 1995, product liability cases fall under comparative fault analysis, although the definition of “fault” for purposes of product liability cases differs from the definition of fault in the Comparative Fault Act. *Compare* Ind. Code § 34-6-2-45 with Ind. Code § 34-20-8-1.

Indiana Code § 34-6-2-45(b) specifies that the Comparative Fault Act covers all types of fault (including intentional acts); thus instructions for cases involving both negligent and intentional acts can include the comparative fault verdict forms, which can name the intentional actors as parties or nonparties, depending on the circumstances of the case.

1907 Reasonable Care—Definition

Reasonable care means being careful and using good judgment and common sense.

Comments

Negligence consists of the failure to use reasonable care, due care, or ordinary care, which is measured by the care a person of reasonable prudence would ordinarily exercise under like conditions and circumstances. *Central Transport, Inc. v. Great Dane Trailers, Inc.*, 423 N.E.2d 675 (Ind. Ct. App. 1981); *Southern Ry. Co. v. Harpe*, 223 Ind. 124, 58 N.E.2d 346 (1944); *Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 38 N.E.2d 257 (1941); *Cleveland, C., C. & St. L. Ry. v. Jones*, 51 Ind. App. 245, 99 N.E. 503 (1912).

When found to exist, the duty to exercise reasonable care under the circumstances never changes; however, the standard of conduct required to measure up to that duty varies depending upon the particular circumstances. *Franklin v. Benock*, 722 N.E.2d 874 (Ind. Ct. App. 2000), *reh'g denied, trans. denied*.

In Indiana there are no degrees of care. The use of such terms as slight care, great care, highest degree of care, or other like expressions in instructions as indicating the quantum of care the law exacts under special conditions and circumstances is misleading. *Thompson v. Ashba*, 122 Ind. App. 58, 102 N.E.2d 519 (1951); *Midwest Motor Coach Co. v. Elliott*, 95 Ind. App. 64, 182 N.E. 541 (1932).

A person with a mental disability is generally held to the same standard of care as that of a reasonable person under the same circumstances without regard to the person's capacity to control or understand the consequences of his or her actions. *See* Restatement 2d Torts § 283B (1965); *Creasy v. Rusk*, 730 N.E.2d 659, 667 (Ind. 2000). In *Creasy*, the Supreme Court balanced three factors to determine whether an individual owes a duty to another (the relationship between the parties, whether the harm to the person injured was reasonably foreseeable, and public policy concerns) and held that an Alzheimer patient owed no duty of care to a nursing home assistant who was injured when the patient kicked her.

For the standard of care of children, *see* Instruction No. 1129 on contributory negligence of children and Instruction No. 927 on comparative fault of children.

1909 Responsible Cause (Proximate Cause)—Definition

A person's conduct is legally responsible for causing [an injury][property damage][a death] if:

- (1) the [injury][property damage][a death] would not have occurred without the conduct, and
- (2) the [injury][property damage][a death] was a natural, probable, and foreseeable result of the conduct.

This is called a "responsible cause."

[There can be more than one responsible cause for an injury.]

Comments

Scholars identify the use of legal jargon and arcane legalese as the most serious flaws of contemporary jury instructions. John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1209 (2002). In fact, in one study of 14 jury instructions, the proximate cause instruction produced proportionally the most misunderstanding among laypersons. The study revealed that jurors mistake "proximate cause" for "approximate cause," "estimated cause," or some fabrication. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979); see also Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L.J. 456, 468 (1962) ("proximate cause" is frequently misinterpreted to mean "probable" or "approximate cause"); James D. Wascher, *The Importance of Juries: The Long March Toward Plain English Jury Instructions*, 19 Chicago Bar Ass'n Record 50, 50-51 (2005) (a Chicago judge reported that he presided over a trial in which the jury sent him a note asking whether proximate cause meant "it's pretty close to the cause").

Prosser and Keeton say that proximate cause is "is an unfortunate word, which places entirely the wrong emphasis on the factor of physical or mechanical closeness." Prosser & Keeton, *The Law of Torts* § 42 (5th ed. 1984). They even imply that it was a sin to have coined the term "proximate cause" in the first place. Prosser & Keeton, *The Law of Torts* § 42. ("The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins.") The Committee has determined that use of a term so likely to be misunderstood is against the policy behind clear jury instructions.

There are two types of causation in a negligence case—causation in fact and proximate cause. See, e.g., Prosser & Keeton, *The Law of Torts* §§ 41 (causation in fact), 42 (proximate cause). Causation in fact is the threshold question of whether "but for" the defendant's negligent conduct, plaintiff's harm would not have occurred. Or, to put it another way, plaintiff's harm would not have occurred without the defendant's negligent conduct. *Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981) (citing W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971); 21 I.L.E. Negligence § 62 (1959)). Because the consequences of an act go forward to eternity and back before the dawn of human events, there must also be "some reasonable connection between the act or omission of the defendant and

the damage which the plaintiff has suffered Prosser & Keeton, The Law of Torts § 41. This is proximate cause, and it boils down to “whether the conduct has been so significant and important a cause that the defendant should be legally responsible.” Prosser & Keeton, The Law of Torts § 41. Prosser and Keeton therefore suggest that either “responsible cause” or “legal cause” would be a more appropriate term. Prosser & Keeton, The Law of Torts § 41. Because use of the term “legal cause” might suggest to the jury that there could also be an “illegal cause,” the Committee selected “responsible cause.”

The Indiana Supreme Court has held that a proximate cause instruction is not *required* to refer to “but for” causation, “so long as the instructions as a whole adequately convey the law in this area.” *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 301 (Ind. 2009). To ensure that the instructions as a whole do adequately convey both proximate cause and causation in fact, the Committee has included both concepts in this one instruction. Subpart (1) of the instruction (“the injury would not have occurred without the conduct”) instructs on causation in fact. And because the Indiana Supreme Court has explained proximate cause as the natural and probable consequence of the conduct, subpart (2) of the instruction (“the injury was a natural and probable result of the conduct”) instructs on proximate cause. “A negligent act is said to be the proximate cause of an injury ‘if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.’ ” *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003) (quoting *Bader v. Johnson* 732 N.E.2d 1212, 1218 (Ind. 2000)).

Plaintiff in a negligence action has the burden of proving causation in fact by a preponderance of the evidence. *Turner v. Davis*, 699 N.E.2d 1217 (Ind. Ct. App. 1998) (causation in fact), *reh’g denied, trans. denied*; *Carter v. Aetna Life Ins. Co.*, 217 Ind. 282, 27 N.E.2d 75 (1940) (proximate cause). What is the proximate cause of the injury is ordinarily a question of fact for the jury that becomes a question of law when only a single conclusion can be drawn from the facts. *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101 (Ind. Ct. App. 1999).

The court is not required to repeat the substance of an instruction defining proximate cause, and outlining the necessity of establishing it, in every general instruction relating to the subject of negligence. *Swallow Coach Lines, Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938).

The “conduct” discussed in this Instruction includes acts and omissions. *See, e.g.*, Instruction Nos. 909 and 1107.

There can be more than one responsible cause for an injury. *See, e.g.*, *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006) (“An injury may have more than one proximate cause.”); *Board of Comm’rs v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992) (“There may be more than one proximate cause of an event.”), *trans. denied*; *Krohn v. Shidler*, 140 Ind. App. 175, 185, 221 N.E.2d 817 (1966) (“It is not necessary that such negligence be the sole proximate cause.”), *reh’g denied*. The bracketed sentence about multiple responsible causes should be given when it is an issue in the case.

1910 Foreseeable—Defined

[An injury][Property damage][A death] is “foreseeable” when a person should realize that [his][her] act or failure to act might cause harm:

Comments

In the context of proximate/responsible cause, the question is whether the injury “is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.” *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 108 (Ind. 2002) (citing *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000)). “The determination of what is reasonably foreseeable is not judged by the subjective opinions of those involved, but is based upon the standard of due care in avoiding a result which might reasonably have been anticipated in the ordinary experience of people.” *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 917–18 (Ind. Ct. App. 2001) (citing *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101, 1105 (Ind. Ct. App. 1999)). When some harm is foreseeable, a person is responsible for any injury even if the extent of the injury was unforeseeable. *Bolin v. Wingert*, 764 N.E.2d 201, 207–08 (Ind. 2002). “If the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor’s negligence.” *Hampton v. Moistner*, 654 N.E.2d 1191, 1194 (Ind. Ct. App. 1995).

1911 Status and Duty in General

You must decide whether [plaintiff] in this case was an invitee, a licensee, or a trespasser on [defendant]'s property.

[Property owners][Occupants] owe different levels of care to invitees, licensees, and trespassers.

Comments

This instruction should be given in cases where there is a factual question as to the status of one person injured on another's property.

If there is no question as to the injured party's status, the court should inform the jury of the party's status at the beginning of the instruction on the duty owed to someone with that status. *See* the opening bracketed sentences of Instruction Nos. 1915, 1921, and 1929.

A person entering upon the land of another comes on to the land either as an invitee, a licensee, or a trespasser. *Rhoades v. Heritage Invs., LLC*, 839 N.E.2d 788 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*. The entrant's status determines the landowner's duty to him. *Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991), *reh'g denied*; *Moore v. Greensburg High Sch.*, 773 N.E.2d 367, 370 (Ind. Ct. App. 2002); *Barbre v. Indianapolis Water Co.*, 400 N.E.2d 1142, 1145 (Ind. Ct. App. 1980).

Generally, an entrant's status is matter of law for the trial court, not the jury. *Morningstar v. Maynard*, 798 N.E.2d 920, 922 (Ind. Ct. App. 2003). Where evidence of material fact is in conflict, the jury should determine the entrant's status; the question is one for the court only where the controlling facts are undisputed. *Standard Oil Co. v. Scoville*, 132 Ind. App. 521, 528, 175 N.E.2d 711, 714 (1961), *modified on other grounds by Burrell*, 569 N.E.2d at 641.

Ind. Code §§ 14-22-10-2 & -2.5 (on recreational use and hunting, fishing, and trapping) may change the general rules on the liability of owners and occupiers of land.

1912 Possessor of Land

[*Defendant(s)*] need not have exclusive control to have sufficient control over the (land/property/building). Several persons or entities may each have sufficient control as an owner or as an occupant even though [his][her] control is only partial or joint.

Comments

The issue of possessor of land can be a mixed question of law and fact. If that is applicable to your case, then you should use this instruction/this definition may be helpful.

In premises liability cases, whether a duty is owed depends primarily upon whether a defendant was in control of the premises when the accident occurred. *Rhodes v. Wright*, 805 N.E.2d 382, 385–86 (Ind. 2004). The rationale is to subject to liability any person or entity who could have known of any dangers on the premises and therefore could have acted to prevent any foreseeable harm. *Id.* More than one person can be in control of the premises and be subject to liability. *Rhodes v. Wright*, 805 N.E.2d 382, 386 (Ind. 2004); *Daviess-Martin Cty. Joint Parks & Recreation Dep't v. Estate of Abel by Abel*, 77 N.E.3d 1280, 1288 (Ind. Ct. App. 2017), *trans. denied*; *Rawls v. Marsh Supermarket, Inc.*, 802 N.E.2d 457, 460 (Ind. Ct. App. 2004); Restatement (Second) of Torts § 328E (1965).

In *Branscomb v. Wal-Mart Stores E., L.P.*, 165 N.E.3d 982 (Ind. 2021) the Indiana Supreme Court adopted Restatement (Second) of Torts § 328E to define a possessor of land. A possessor of land is

- (a) a person who is in occupation of the land with intent to control it or
- (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
- (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Restatement (Second) of Torts § 328E (1965).

Branscomb, 165 N.E.3d at 986.

1913 Trespasser

A trespasser is a person who is on the property of another [person][entity] without the [owner's][occupant's] permission.

Comments

Trespassers are those who enter premises for their own convenience, curiosity, or entertainment; enter at their own risk; and take the property as they find it. *Burrell v. Meads*, 569 N.E.2d 637, 640 (Ind. 1991), *reh'g denied*; *Gaboury v. Ireland Rd. Grace Brethren, Inc.*, 446 N.E.2d 1310, 1314 (Ind. 1983), *reh'g denied*; *Moore v. Greensburg High Sch.*, 773 N.E.2d 367, 370 (Ind. Ct. App. 2002); *see also* Ind. Code §§ 14-16-1-28 (restrictions on landowner liability to those on off-road vehicles for recreational purposes); 14-22-10-2 (restrictions on landowner liability to hunters, fishers, swimmers, trappers, campers, hikers, sightseers, and others who are trespassers or licensees).

A judge should give this instruction only if there is a question of the legal status of the party involved. If not, the judge should inform the jury of the party's status at the beginning of the instruction on the duty owed to someone with that status. *See* the opening bracketed sentences of Instruction Nos. 1915, 1921, and 1929.

1915 Duty to Trespasser (Adults)

[(Name)] was a trespasser on the property of the (owner)(occupant), (name)].

Trespassers enter another [person][entity]'s property at their own risk of injury from conditions on the property.

An [owner][occupant] of property has no responsibility for a trespasser's safety until the [owner][occupant] knows that the trespasser is present.

An [owner][occupant] who knows that a trespasser is present must not willfully or intentionally injure the trespasser.

Comments

The first bracketed sentence should be omitted where there is a question about whether the party involved was a trespasser, licensee, or invitee; if there is no question that the party was a trespasser, the bracketed sentence should be given.

The Indiana Legislature enacted Indiana Code § 34-31-11-1 *et seq.*, effective July 1, 2015, stating the Legislature intended to codify the common law duty owed by a landowner to a trespasser. Indiana Code § 34-31-11-5.

The Committee believes discrepancies may exist between the new statute and common law, including whether the landowner owes a duty to a trespasser he had discovered or *should have* discovered. Indiana Code § 34-31-11-3 does not mention the "should have discovered" standard. It may be necessary for the Indiana Supreme Court or Indiana Court of Appeals to resolve this issue.

In *Surratt v. Petrol, Inc.*, 312 N.E.2d 487 (Ind. Ct. App. 1974), *reh'g denied*, the Court adopted the Restatement (Second) of Torts § 336, which states: "A possessor of land who knows or has reason to know of the presence of another who is trespassing on the land is subject to liability for physical harm thereafter caused to the trespasser by the possessor's failure to carry on his activities upon the land with reasonable care for the trespasser's safety." *Id.* at 492. *Surratt* involved trespassers to chattel (rather than land).

Burrell v. Meads, 569 N.E.2d 637 (Ind. 1991), *reh'g denied*, a more recent Indiana Supreme Court case involving licensees (rather than trespassers), stated the duty differently than *Surratt* but consistently with Indiana Code § 34-31-11-3: "a landowner owes a trespasser the duty to refrain from willfully or wantonly (intentionally) injuring him after discovering his presence." *Id.* at 639.

The Committee has revised the Instruction consistently with Indiana Code § 34-31-11-3 and *Burrell*.

The duty owed to a trespasser is merely to refrain from wantonly or willfully injuring him after discovering his presence. *Morningstar v. Maynard*, 798 N.E.2d 920, 922 (Ind. Ct. App. 2003); *Taylor v. Duke*, 713 N.E.2d 877, 881 (Ind. Ct. App. 1999); *Frye v. Trustees of the Rumbletown Free Methodist Church*, 657 N.E.2d 745, 749 (Ind. Ct. App. 1995), *reh'g denied*. Some cases say "willfully or wantonly" and others say "willfully or intentionally"; the Committee chose the latter for its instruction, as it is plainer English.

A landowner's duty to children, whether they are trespassers or licensees, may be

higher than the landowner's duty to adults. *Morningstar*, 798 N.E.2d at 922; *Lowden v. Lowden*, 490 N.E.2d 1143, 1144 (Ind. Ct. App. 1986), *reh'g denied*, *trans. denied*; see also Instruction No. 1935 (attractive nuisance).

owner (occupant) of property has no responsibility for a dangerous condition on the property if the owner (occupant) knows that the property is dangerous and does not take any action to correct the condition.

The jury should decide whether the defendant knew or should have known that the property was dangerous and whether the defendant failed to take any action to correct the dangerous condition. The jury should also decide whether the plaintiff was a child and whether the defendant knew or should have known that the plaintiff was a child. If the plaintiff was a child and the defendant knew or should have known that the plaintiff was a child, the defendant has a higher duty to the plaintiff than if the plaintiff was an adult. The jury should decide whether the defendant's failure to take any action to correct the dangerous condition was the proximate cause of the plaintiff's injury. The jury should also decide whether the plaintiff's injury was a foreseeable result of the defendant's failure to take any action to correct the dangerous condition.

If the plaintiff was a child and the defendant knew or should have known that the plaintiff was a child, the defendant has a higher duty to the plaintiff than if the plaintiff was an adult. The jury should decide whether the defendant's failure to take any action to correct the dangerous condition was the proximate cause of the plaintiff's injury. The jury should also decide whether the plaintiff's injury was a foreseeable result of the defendant's failure to take any action to correct the dangerous condition.

The duty owed to a trespasser is less than the duty owed to an invitee. The jury should decide whether the plaintiff was a trespasser or an invitee. If the plaintiff was a trespasser, the defendant has a lower duty to the plaintiff than if the plaintiff was an invitee. The jury should decide whether the defendant's failure to take any action to correct the dangerous condition was the proximate cause of the plaintiff's injury. The jury should also decide whether the plaintiff's injury was a foreseeable result of the defendant's failure to take any action to correct the dangerous condition.

The jury should decide whether the defendant's failure to take any action to correct the dangerous condition was the proximate cause of the plaintiff's injury. The jury should also decide whether the plaintiff's injury was a foreseeable result of the defendant's failure to take any action to correct the dangerous condition.

1917 Trespasser—Elements and Burden of Proof (Adults)

To recover damages from [defendant], [plaintiff] must [prove][have proven] each of the following by the greater weight of the evidence:

- (1) [defendant] was the [owner][occupant] of property;
- (2) [plaintiff] was a trespasser on the property [owned][occupied] by [defendant];
- (3) [plaintiff] was injured as a result of a condition on the property;
- (4) [defendant] knew that [plaintiff] was present; and
- (5) [defendant] willfully or intentionally injured [plaintiff].

Comments

Where elements (1) and (2) in the Instruction are not at issue in a case, they may be removed.

The Indiana Legislature enacted Indiana Code § 34-31-11-1 *et seq.*, effective July 1, 2015, stating the Legislature intended to codify the common law duty owed by a landowner to a trespasser. Indiana Code § 34-31-11-5.

The Committee believes discrepancies may exist between the new statute and common law, including whether the landowner owes a duty to a trespasser he had discovered or *should have* discovered. Indiana Code § 34-31-11-3 does not mention the “should have discovered” standard. It may be required for the Indiana Supreme Court or the Indiana Court of Appeals to resolve this issue.

In *Surratt v. Petrol, Inc.*, 312 N.E.2d 487 (Ind. Ct. App. 1974), *reh’g denied*, the Court adopted the Restatement (Second) of Torts § 336, which states: “A possessor of land who knows or has reason to know of the presence of another who is trespassing on the land is subject to liability for physical harm thereafter caused to the trespasser by the possessor’s failure to carry on his activities upon the land with reasonable care for the trespasser’s safety.” *Id.* at 492. *Surratt* involved trespassers to chattel (rather than land).

Burrell v. Meads, 569 N.E.2d 637 (Ind. 1991), *reh’g denied*, a more recent Indiana Supreme Court case involving licensees (rather than trespassers), stated the duty differently than *Surratt* but consistently with Indiana Code § 34-31-11-3: “a landowner owes a trespasser the duty to refrain from willfully or wantonly (intentionally) injuring him after discovering his presence.” *Id.* at 639.

The Committee has revised the Instruction consistently with Indiana Code § 34-31-11-3 and *Burrell*.

1919 Licensee

A licensee is a person who is on the property of another [person][entity] for [his][her] own purposes when the [owner][occupant] of the property either permits that person to enter the property, or does not object.

Comments

The terms “licensee,” “mere licensee,” and “licensee by permission” have the same legal meaning under Indiana law. To avoid confusion, the instruction should only use the term “licensee.”

A judge should give this instruction only if there is a question of the legal status of the party involved. If not, the judge should inform the jury of the party’s status at the beginning of the instruction on the duty owed to someone with that status. *See* the opening bracketed sentences of Instruction Nos. 1915, 1921, and 1929.

Licensees and trespassers enter the land of another for their own convenience, curiosity, or entertainment, and take the premises as they find them; unlike trespassers, licensees have a privilege to enter or remain on the land by virtue of the landowner’s or occupier’s permission or sufferance. *Burrell v. Meads*, 569 N.E.2d 637, 640 (Ind. 1991), *reh’g denied*; *Moore v. Greensburg High Sch.*, 773 N.E.2d 367, 370 (Ind. Ct. App. 2002); *Taylor v. Duke*, 713 N.E.2d 877, 881 (Ind. Ct. App. 1999).

The fireman’s rule states that public safety officers going onto the premises of another in the course of their duties act as licensees. *Thompson v. Murat Shrine Club*, 639 N.E.2d 1039, 1040 (Ind. Ct. App. 1994); *Woodruff v. Bowen*, 136 Ind. 431, 442, 34 N.E. 1113, 1117 (1893). *Babes Showclub v. Lair*, 918 N.E.2d 308 (Ind. 2009), held that the fireman’s rule bars recovery by a professional emergency responder for the negligence that created the situation requiring the response.

1921 Duty to Licensee

[(Name) was a licensee on the property of the (owner)(occupant), (name).]

Licensees enter another [person][entity]'s property at their own risk of injury from conditions on the property.

However, an [owner][occupant] must not willfully or intentionally injure the licensee, or act in a manner to increase the licensee's risk of injury.

In addition, an [owner][occupant] who knows of a hidden danger on the property must warn the licensee of that danger.

Comments

The first bracketed sentence should be omitted where there is a question about whether the party involved was a trespasser, licensee, or invitee; if there is no question that the party was a licensee, the bracketed sentence should be given.

First, a landowner must refrain from willfully or intentionally injuring a licensee or acting in a manner that will increase the licensee's peril. *Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991), *reh'g denied*; *Woodruff v. Bowen*, 136 Ind. 431, 34 N.E. 1113 (1893); *Moore v. Greensburg High Sch.*, 773 N.E.2d 367, 369 (Ind. Ct. App. 2002); *Taylor v. Duke*, 713 N.E.2d 877, 881 (Ind. Ct. App. 1999); *Barbre v. Indianapolis Water Co.*, 400 N.E.2d 1142, 1146 (Ind. Ct. App. 1980). A showing of ordinary negligence is insufficient for relief. *Gaboury v. Ireland Rd. Grace Brethren, Inc.*, 446 N.E.2d 1310, 1314-15 (Ind. 1983), *reh'g denied*.

Second, a landowner has a duty to warn a licensee of any hidden dangers on the property of which the owner has knowledge. *See Moore*, 773 N.E.2d at 369 (affirming without discussing instruction requiring owner's knowledge). If the landowner discovers the licensee in peril, the owner may not act in a way that might reasonably be expected to increase the peril, and the owner should use reasonable care to avoid injuring the licensee after the danger is discovered. *Terre Haute, I. & E. Traction Co. v. Sanders*, 80 Ind. App. 16, 136 N.E. 54, 56 (1922).

A landowner has a third duty to a licensee based on the "entrapment-affirmative control of the instrument test." *Fort Wayne Nat'l Bank v. Doctor*, 149 Ind. App. 365, 374, 272 N.E.2d 876, 882 (1971), *overruled in part by Burrell*, 569 N.E.2d 637 (overruled to the extent it holds a social guest is a licensee), (citing *Pier v. Schultz*, 243 Ind. 200, 182 N.E.2d 255 (1962)). Indiana cases rarely discuss this third duty, but *Gaboury* explains that it means that a landowner must give reasonable notice or warning to licensees if he does any positive act creating a new concealed danger to life and limb. *Gaboury v. Ireland Rd. Grace Brethren, Inc.*, 446 N.E.2d at 1315; *see also* Restatement of Torts, § 342 (dangerous conditions known to possessor).

The duty to a child licensee may be higher than that owed to an adult. *Lowden v. Lowden*, 490 N.E.2d 1143, 1144 (Ind. Ct. App. 1986), *reh'g denied, trans. denied*.

1923 Licensee—Elements and Burden of Proof

To recover damages from [defendant], [plaintiff] must [prove][have proven] each of the following by the greater weight of the evidence:

- (1) [defendant] was the [owner][occupant] of property;
- (2) [plaintiff] was a licensee on the property [owned][occupied] by [defendant];
- (3) [plaintiff] was injured as a result of a condition on the property; and
- (4) [defendant]:
 - (a) willfully or intentionally injured the licensee, or acted in a manner to increase the licensee's risk of injury, or
 - (b) knew of a hidden danger on the property and did not warn the licensee of that danger.

Comments

Where elements (1) and (2) in the Instruction are not at issue in a case, they may be removed. In addition, where there is no question about whether the plaintiff was a licensee, the word "licensee" in paragraph 4(a) of the instruction should be replaced with the plaintiff's proper name.

1925 Invitee

An invitee is a person who a property [owner][occupant] invites to enter or remain on [his][her][its] property.

Comments

A judge should give this instruction only if there is a question of the legal status of the party involved. If not, the judge should inform the jury of the party's status at the beginning of the instruction on the duty owed to someone with that status. See the opening bracketed sentences of Instruction Nos. 1915, 1921, and 1929.

Prior to the landmark decision in *Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991), *reh'g denied*, Indiana defined an invitee under the economic benefit test as a person who goes on the owner's premises with his express or implied invitation to do an act that advantageous to the owner or of mutual advantage to both. In *Burrell*, the Indiana Supreme Court rejected the economic benefit test, adopted the invitation test, and concluded that public invitees, business visitors, and social guests are all invitees. *Burrell*, 569 N.E.2d at 640, 642-43.

1927 Invitation—Express or Implied

An invitation to enter or remain on the property of another may be express or implied.

An “express” invitation is a spoken or written invitation.

An invitation is “implied” when the conduct of the [owner][occupant] would lead a reasonable person to believe [he][she] has been invited to enter or remain on the property.

Comments

In *Burrell v. Meads*, 569 N.E.2d 637, 640 (Ind. 1991), *reh’g denied*, the Court adopted the invitation test and held that an invitee is a public invitee, a business visitor, or a social guest.

In determining whether an individual is an invitee or licensee, the distinction between the terms “invitation” and “permission” becomes critical. Permission indicates that the possessor of property is *willing* that another person enter or remain on the land if the other person desires to do so, while invitation is conduct that justifies others in believing that *the possessor desires* them to enter on the property. *McCormick v. Department of Natural Resources*, 673 N.E.2d 829, 836 (Ind. Ct. App. 1996); *see also Moore v. Greensburg High Sch.*, 773 N.E.2d 367, 371 (Ind. Ct. App. 2002) (holding that the injured parent was not an invitee because evidence demonstrated that school simply granted permission to members of a parent committee to use the facility).

An invitation may be limited as to the manner in which the invitee may use the premises. 65 C.J.S. Negligence § 63(52), 757 (1966) (footnotes omitted).

A person’s status can change once he has entered another person’s land. For example, an invitee may become a licensee if his use of the property does not correspond to the owner’s reason for holding the property open. *Markle v. Hacienda Mexican Restaurant*, 570 N.E.2d 969, 974 (Ind. Ct. App. 1991) (plaintiff entered property as invitee to eat at restaurant, but became licensee when he moved something from his vehicle to a co-worker’s vehicle in the parking lot); *Hoosier Cardinal Corp. v. Brizius*, 136 Ind. App. 363, 199 N.E.2d 481 (1964) (plaintiff entered property as invitee, but stepped out of that role when he made an unanticipated use of structures on the defendant’s property), *reh’g denied*.

A visitor does not lose his status as an invitee as long as the visitor is engaged in activity reasonably related or incidental to the invitation extended by the owner. *Markle*, 570 N.E.2d at 974–75. An incidental task is one that an invitee could reasonably be expected to do under the circumstances, if the deviation from his main intention when he entered the business premises is slight. *Markle*, 570 N.E.2d at 974–75.

1928 Duty of Invitee

An invitee must use [his][her] senses in an ordinary manner to discover a dangerous condition on the property.

An invitee is not required to anticipate or search for hidden or unusual dangers.

Comments

A person must use their faculties in an ordinary manner to discover danger. *Shelby Nat. Bank v. Miller*, 147 Ind. App. 203, 224, 259 N.E.2d 450, 464 (1970). A pedestrian is not bound to keep his eyes constantly on the walkway. Nor is a pedestrian required to make an active search for defects, or look for danger at every step. *Templeton v. City of Hammond*, 679 N.E.2d 1368, 1373 (Ind. Ct. App. 1997), quoting *Town of Argos v. Harley*, 114 Ind. App. 290, 49 N.E.2d 552, 558 (1943). See also, *Associated Truck Lines v. Velthouse*, 227 Ind. 139, 152, 84 N.E.2d 54, 59 (1949). See also, Restatement (Second) of Torts § 343, cmt. d (1965).

1929 Duty to Invitee—Conditions on the Land

[(Name) was an invitee on the property of the (owner)(occupant), (name).]

An [owner][occupant] of property is liable for injury caused to an invitee by the property's condition only if the [owner][occupant]:

- (1) knew that the condition existed and realized that it created an unreasonable danger to an invitee, or should have discovered the condition and its danger;
- (2) should have expected that the invitee would not discover or realize the danger of the condition, or would fail to protect himself or herself against it; and
- (3) failed to use reasonable care to protect the invitee against the danger.

Comments

This instruction applies when the injury resulted from a condition on the land. The first bracketed sentence should be omitted where there is a question about whether the party involved was a trespasser, licensee, or invitee; if there is no question that the party was an invitee, the bracketed sentence should be given.

In *Burrell v. Meads*, 569 N.E.2d 637, 643 (Ind. 1991), *reh'g denied*, the Indiana Supreme Court adopted the definition of a landowner's duty to an invitee as set forth in the Restatement 2d Torts § 343 (1965):

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Restatement 2d Torts § 343.

The landowner has a duty to warn of any latent danger on the premises of which the landowner has knowledge. *Burrell*, 569 N.E.2d at 639–40; *see also Clark v. Huntington*, 74 Ind. App. 437, 445, 127 N.E. 301, 304 (1920). When the possessor can and should anticipate a dangerous condition that will cause harm to invitee, the possessor is not relieved of the duty of reasonable care to warn the invitee or take other reasonable steps to protect him “against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.” *Merrill v. Knauf Fiber Glass*, 771 N.E.2d 1258, 1266 (Ind. Ct. App. 2002).

The proprietor of a store has an active and continuous duty only to use ordinary care to keep the store in a reasonably safe condition and, while not an insurer of the safety of the customers entering the store, must maintain the store in such a way not to cause injury to one lawfully entering to buy things. *Huttinger v. G. C. Murphy Co.*, 131 Ind. App. 642, 647, 172 N.E.2d 74, 76–77 (1961); *see also Wal-Mart*

Stores v. Wright, 774 N.E.2d 891 (Ind. 2002). "Wal-Mart, had and has an active and continuous duty and obligation to inspect their premises from time to time in a reaonable [sic] effort to discover and remedy defects that make said premises unsafe for use by customers such as the Plaintiff, Delmar Blaylock." *Wal-Mart Stores, Inc. v. Blaylock*, 591 N.E.2d 624 (Ind. Ct. App. 1992).

A proprietor of a tavern is likewise not the insurer of the safety of patrons. The duty of a business to use reasonable care extends to keeping its parking lot safe and providing a safe and suitable means of ingress and egress. *Vernon v. Kroger Co.*, 712 N.E.2d 976, 979 (Ind. 1999).

The trial court determines if a duty exists. The fact-finder must decide whether the landowner or occupier breached the duty, and whether the breach was a responsible cause of plaintiff's damages.

1930 Assumption Property is Reasonably Safe for Use

An invitee has the right to assume the property is reasonably safe for their use.

Comments

This is consistent with Indiana Model Civil Jury Instructions (2020), No. 1307, and the general rule that an actor has the right to assume that others owing him a duty of reasonable care will exercise reasonable care. *Hi-Speed Auto Wash, Inc. v. Simeri*, 169 Ind. App. 116, 123, 346 N.E.2d 607, 610 (1976). This assumption applies to invitees visiting a property. Invitees are entitled to assume the premises they enter are reasonably safe because owners are required to exercise reasonable care for their protection. *Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991); *Lincoln Operating Co. v. Gillis*, 232 Ind. 551, 557, 114 N.E.2d 873, 876 (1953); *Robertson Bros. Dep't Store v. Stanley*, 228 Ind. 372, 379–80, 90 N.E.2d 809, 811 (1950); *Associated Truck Lines v. Velthouse*, 227 Ind. 139, 152, 84 N.E.2d 54, 59 (1949). See also, Restatement (Second) of Torts § 343, cmt. d (1965).

Get-N-Go, Inc. v. Markins, 550 N.E.2d 748, 751 (Ind. 1990):

“Moreover, the general rule is that an actor, until he has notice to the contrary, has the right to assume that others owing him a duty of reasonable care will exercise reasonable care toward him.” The Supreme Court discussed this concept in a comparative fault case. It said “These cases make clear that what ceases once the invitee has knowledge that the premises are unsafe is not the duty of the invitor, but the invitee’s right to assume that the invitor has carried out his duty to use due care.” *Hammond*, 262 Ind. at 86–87, 311 N.E.2d at 824–25; *Robertson Bros.*, 228 Ind. at 378, 90 N.E.2d at 811. The distinction is a crucial one, particularly with the advent of comparative fault in our state. The knowledge of a plaintiff in a negligence action will have a bearing on some affirmative defenses relied upon by a defendant, most prominently incurred risk, and often contributory negligence. However, affirmative defenses have never excused a defendant’s duty to exercise reasonable care. Instead, what is excused is the liability for failing to exercise the duty of reasonable care. The duty of an invitor to exercise reasonable care for the safety of his invitees is an active and continuing one. *Id.* It does not cease simply because the invitee learns of unsafe conditions on the premises, but the invitee’s knowledge may, of course, be considered in determining his fault.

1931 Invitee—Elements and Burden of Proof—Conditions on the Land

To recover damages from [*defendant*], [*plaintiff*] must [prove][have proven] each of the following by the greater weight of the evidence:

- (1) [*defendant*] was the [owner][occupant] of property;
- (2) [*plaintiff*] was an invitee on the property [owned][occupied] by [*defendant*];
- (3) [*plaintiff*] was injured as a result of a condition on the property; and
- (4) [*defendant*]:
 - (a) knew that the condition existed and realized that it created an unreasonable danger to invitees, or should have discovered the condition and its danger;
 - (b) should have expected that the invitees would not discover or realize the danger of the condition, or would fail to protect themselves against it; and
 - (c) failed to use reasonable care to protect the invitees against the danger.

Comments

Where elements (1) and (2) in the Instruction are not at issue in a case, they may be removed.

Indiana Code ch. 34-31-5 provides limited liability for “Equine Activities.” *See infra* 1929.

Indiana Code ch. 34-31-6 provides limited liability for “Roller Skating Rinks.”

Indiana Code ch 34-31-6.5 provides limited liability for “Ice Skating Rinks.”

Indiana Code ch. 34-31-9 provides limited liability for injuries arising from “Agritourism Activities.” *See infra* 1929.

Indiana Code ch. 34-31-10 provides limited liability arising from “Public Use of School Facilities for Physical Fitness Activities.”

Indiana Code ch. 34-31-11.4 provides limited liability for some “Operators of Recreational Facilities.”

Indiana Code ch. 14-22-10-2 provides limited liability for recreational use of land.

1932(A) Duty to Invitee—Elements and Burden of Proof—Activity on the Land

An [owner][occupier] of property is liable for injury caused to an invitee due to activities that happen on the land if [plaintiff][proves][has proven] each of the following by the greater weight of the evidence:

- (1) [defendant] was the [owner][occupier] of property;
- (2) [plaintiff] was an invitee on the property [owned][occupied] by [defendant];
- (3) [plaintiff] was injured as a result of [describe the act or failure to act from which the injury arose]; and
- (4) [defendant] failed to use reasonable care to protect the invitee against [describe the act or failure to act from which the injury arose].

Comments

Where elements (1) and (2) in the Instruction are not at issue in a case, they may be removed.

In *Rogers v. Martin*, 63 N.E.3d 316 (Ind. 2016), the Indiana Supreme Court provided guidance in cases involving injuries to invitees due to activities on a landowner's premises unrelated to the premises' condition. The Indiana Supreme Court held under Indiana premises liability law, the duty a landowner owes to an invitee is well established: a landowner must exercise reasonable care for the invitee's protection while the invitee is on the premises. However, the trial court must look to foreseeability of harm to decide whether the landowner-invitee "duty to protect" extends to a particular situation. In determining duty, foreseeability is a general threshold determination in which the trial court evaluates: (1) the broad type of plaintiff, and (2) the broad type of harm. In this foreseeability analysis, the trial court must focus on "the general class of persons of which the plaintiff was a member and whether the harm suffered was of a kind normally to be expected—without addressing the specific facts of the occurrence." 63 N.E.3d at 325.

Whether a duty exists is a question of law to be determined by the trial court. *Rogers*, 63 N.E.3d at 321. Once the trial court determines a duty exists, the fact-finder must decide whether the landowner or occupier breached the duty, and whether the breach was a responsible cause of plaintiff's damages.

However, the trial court need not determine if a duty exists where that element has "already been declared or otherwise articulated." *N. Ind. Pub. Serv. v. Sharp*, 790 N.E.2d 462, 465 (Ind. 2003).

Indiana Code ch. 34-31-5 provides limited liability for "Equine Activities." See *infra* 1929.

Indiana Code ch. 34-31-6 provides limited liability for "Roller Skating Rinks."

Indiana Code ch 34-31-6.5 provides limited liability for "Ice Skating Rinks."

Indiana Code ch. 34-31-9 provides limited liability for injuries arising from "Agritourism Activities. See *infra* 1929.

Indiana Code ch. 34-31-10 provides limited liability arising from "Public Use of

School Facilities for Physical Fitness Activities.

Indiana Code ch. 34-31-11.4 provides limited liability for some "Operators of Recreational Facilities."

Indiana Code ch. 14-22-10-2 provides limited liability for recreational use of land.

**1932(B) Duty to Invitee—Elements and Burden of Proof—Third Parties’
Criminal Acts**

An [owner][occupier] of property is liable for injury caused to an invitee due to failure to take reasonable precautions to protect the invitee from criminal acts if [plaintiff-][proves][has proven] each of the following by the greater weight of the evidence:

- (1) [defendant] was the [owner][occupier] of property;
- (2) [plaintiff] was an invitee on the property [owned][occupied] by [defendant];
- (3) [plaintiff] was injured as a result of a criminal act by a third party on the property; and
- (4) [defendant] failed to use reasonable care to protect the invitee against the criminal act.

Comments

Where elements (1) and (2) in the Instruction are not at issue in a case, they may be removed.

In *Goodwin v. Yeakle’s Sports Bar and Grill, Inc.*, 62 N.E.3d 384 (Ind. 2016), the Indiana Supreme Court provided guidance in cases involving injuries to invitees due to criminal acts by third parties on a landowner’s premises. The trial court must first decide—in the context of duty—whether the criminal act is foreseeable.

In determining duty, foreseeability is a general threshold determination in which the trial court evaluates: (1) the broad type of plaintiff, and (2) the broad type of harm. In this foreseeability analysis, the trial court must focus on the general class of persons of which the plaintiff was a member and whether the harm suffered was of a kind normally to be expected—without addressing the specific facts of the occurrence. To determine whether a criminal act is foreseeable in the context of duty, the trial court must assess “whether there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it.” 62 N.E.3d at 392 (quoting *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 367 (Tenn. 2008)).

“To determine whether this duty, as a matter of law, extends to the criminal act at issue in a particular scenario, the critical inquiry is to determine whether the attack was foreseeable, considering the broad type of plaintiff, the broad type of harm, and whether the landowner had reason to expect any imminent harm.” *Cavanaugh’s Sports Bar & Eatery, Ltd. v. Porterfield*, 140 N.E.3d 837, 844 (Ind. 2020).

Whether a duty exists is a question of law to be determined by the trial court. *Rogers v. Martin*, 63 N.E.3d 316, 321 (2016). Once the trial court determines a duty exists, the fact-finder must decide whether the landowner or occupier breached the duty, and whether the breach was a responsible cause of plaintiff’s damages.

1933 Attractive Nuisance

Children may not understand or appreciate the dangers they may encounter when trespassing.

[Owners][Occupants] of property must use ordinary and reasonable care to protect trespassing children from hidden dangers to which children may be attracted on their property.

Comments

The Indiana Legislature enacted Indiana Code § 34-31-11-1 *et seq.*, effective July 1, 2015, stating the Legislature intended to codify the common law duty owed by a landowner to a child trespasser. Indiana Code § 34-31-11-5.

The common law of attractive nuisance as of July 1, 2015, provides as follows:

The attractive nuisance doctrine recognizes that a child may be incapable of understanding and appreciating the dangers that the child may encounter on a landowner's premises and applies when:

- (1) the owner maintained or permitted the problem on the property;
- (2) the problem was peculiarly dangerous to children, and of such a nature that they will not comprehend the danger;
- (3) the problem was particularly attractive to children;
- (4) the owner had actual or constructive knowledge of the condition, and that children do or are likely to trespass, and to be injured; and
- (5) the injury was a foreseeable result of the wrong.

Carroll by Carroll v. Jagoe Homes, Inc., 677 N.E.2d 612, 616 (Ind. Ct. App. 1997), *trans. denied*.

The attractive nuisance doctrine applies only to dangers that are latent, because the property owner is entitled to assume that the child's parent will warn of obvious perils, and care of children who are unable to recognize latent dangers will not be imposed on strangers. *Neal v. Home Bldrs., Inc.*, 232 Ind. 160, 170-71, 111 N.E.2d 280, 286-87 (1953), *reh'g denied*; *see also Carroll*, 677 N.E.2d 612.

Where the owner could have reasonably anticipated that children might come into contact with the dangerous agency, and that contact is reasonably sure to inflict serious injury, the owner should do what is reasonably necessary to prevent that injury, even if the children are trespassers. *Chicago, S. S. & S. B. R. Co. v. Sagala*, 140 Ind. App. 650, 221 N.E.2d 371 (1966); *see also Lowden v. Lowden*, 490 N.E.2d 1143 (Ind. Ct. App. 1986), *reh'g denied, trans. denied*.

To be charged with constructive knowledge, it must appear that the owners actually maintained the condition, that it existed by their actual consent, or that their consent could be implied from their active use or occupancy of the land. *Pier v. Schultz*, 243 Ind. 200, 207 (1962).

The attractive nuisance doctrine does not apply to conditions (either natural or artificial) that are common to nature, because the dangers of conditions common to nature are obvious and known to children. *Lockridge v. Standard Oil Co.*, 124 Ind.

App. 257, 262, 114 N.E.2d 807, 810 (1953); *see also Morningstar v. Maynard*, 798 N.E.2d 920 (Ind. Ct. App. 2003); *Cunningham v. Bakker Produce*, 712 N.E.2d 1002, 1006-07 (Ind. Ct. App. 1999), *trans. denied*. For example, swimming pools and ponds in a park are not an attractive nuisance. *City of Indianapolis v. Johnson*, 736 N.E.2d 295, 299 (Ind. Ct. App. 2000).

On the issue of the comparative fault of children, *see* Instruction No. 927.

1935 Attractive Nuisance—Burden of Proof

To recover damages from [*defendant*], [*plaintiff*] must [prove][have proven] each of the following by the greater weight of the evidence:

- (1) [*defendant*] was the [owner][occupant] of property;
- (2) [*plaintiff*] was a child;
- (3) the condition on the property was maintained or permitted by [*defendant*];
- (4) the danger presented by the condition was hidden;
- (5) the condition was not common to nature, regardless of whether it was natural or artificial;
- (6) the condition was peculiarly dangerous to children, and of such a nature that they would not comprehend the danger;
- (7) the condition was particularly attractive to children;
- (8) [*defendant*] knew or should have known of the condition, and that children do or are likely to trespass and be injured; and
- (9) [*defendant*]'s failure to take reasonable steps to protect [*plaintiff*] from the danger was a responsible cause of [*plaintiff*]'s injury.

Comments

See Instruction No. 1933 cmt.

1937 Duty of [Owner's][Occupant's] Real Estate Agent to Prospective Buyer

An [owner's][occupant's] real estate agent must warn a prospective buyer of hidden defects in the property if the defects are actually known to the agent but not known to the prospective buyer.

The agent is not required to inspect the property for defects.

Comments

This instruction is based on *Masick v. McColly Realtors, Inc.*, 858 N.E.2d 682, 691 (Ind. Ct. App. 2006), which held that a real estate agent does not have a duty to warn a prospective buyer of a hidden defect if the real estate agent does not have actual knowledge of the defect. *See* Instruction No. 3511 (on the definition of a special agent).

1939 Control of Common Areas

Sometimes people who rent property from a landlord are entitled to use common areas. A landlord who controls a common area must keep it in reasonably safe condition.

Comments

A landlord has a duty of reasonable care to maintain the common ways and areas in a reasonably fit and safe condition. *Zawistoski v. Gene B. Glick Co.*, 727 N.E.2d 790, 793 (Ind. Ct. App. 2000); *see also Frost v. Phenix*, 539 N.E.2d 45, 48 (Ind. Ct. App. 1989); *Rossow v. Jones*, 404 N.E.2d 12 (Ind. Ct. App. 1980); *Coleman v. De Moss*, 144 Ind. App. 408, 246 N.E.2d 483 (1969), *reh'g denied*.

A landlord who leases separate portions of the same building to different tenants is bound to maintain in a safe condition those parts of the building used in common by tenants over which the landlord reserves control. *Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157, 1160 (Ind. Ct. App. 1988), *reh'g denied, trans. denied*.

The landlord's duty extends to snow and ice. *Rossow*, 404 N.E.2d at 13-14 (landlord who removed handrail and who usually removed snow and ice from steps, but had neglected that practice for a week, "failed in his duty to exercise reasonable care that the common stairway was reasonably safe and fit"). The owner of a building abutting a public sidewalk has no duty to remove ice and snow from the sidewalk abutting the building merely because he retains control over the premises. *Hirschauer v. C & E Shoe Jobbers, Inc.*, 436 N.E.2d 107, 110 (Ind. Ct. App. 1982).

Exculpatory clauses in residential leases which immunize a landlord against damages caused by his or her own negligence in maintaining common areas are against public policy and are unenforceable. *Ransburg v. Richards*, 770 N.E.2d 393, 402 (Ind. Ct. App. 2002), *trans. denied*.

1941 Hidden Defects—Common Law

A landlord must warn a tenant of a hidden defect on the property when the landlord knows the defect exists but the tenant does not.

Comments

Once a landlord surrenders possession and control of a property to a tenant, the landlord generally has no duty to protect the tenant from injuries due to the property's defective condition. *Zubrenic v. Dunes Valley Mobile Home Park, Inc.*, 797 N.E.2d 802, 806 (Ind. Ct. App. 2003), *trans. denied*; *see also Hunter v. Cook*, 149 Ind. App. 657, 661, 274 N.E.2d 550, 552 (1971). There are two major exceptions to the general rule.

First, "a tenant may recover for injuries stemming from defective premises if the landlord expressly agrees to repair the defect and is negligent in doing so." *Zubrenic*, 797 N.E.2d at 806.

Second, a tenant may recover for injuries caused by latent defects of which the landlord actually knew but which were unknown to the tenant and not disclosed by the landlord. *Zubrenic*, 797 N.E.2d at 806 (citing *Hodge v. Nor-Cen, Inc.*, 527 N.E.2d 1157, 1160 (Ind. Ct. App. 1988) (landlord may be liable for violating an ordinance that required buildings to be equipped with alternative means of escape in the event of a fire), *reh'g denied, trans. denied*); *see also Dickison v. Hargitt*, 611 N.E.2d 691, 694–695 (Ind. Ct. App. 1993) (landlord must actually know of the hidden defect); *Rogers v. Grunden*, 589 N.E.2d 248, 255 (Ind. Ct. App. 1992), *reh'g denied, trans. denied*; *Pitcock v. Worldwide Recycling, Inc.*, 582 N.E.2d 412, 415 (Ind. Ct. App. 1991); *Zimmerman v. Moore*, 441 N.E.2d 690, 693–94 (Ind. Ct. App. 1982), *reh'g denied*; Ind. Code § 32-31-8-5 (landlord's statutory duties to tenant).

1943 Highways, Streets, and Sidewalks—Duty of Governmental Entity

A governmental entity must use reasonable care to keep its [highways][streets][alleys-][sidewalks] in reasonably safe condition for travel.

Comments

Where there are more defendants other than the governmental entity (e.g., contractors, abutting property owners) the instruction should be modified.

A municipal corporation must use reasonable care and diligence to keep its streets and sidewalks in a reasonably safe condition for travel. *Carroll v. Jobe*, 638 N.E.2d 467, 469 (Ind. Ct. App. 1994), *reh'g denied, trans. denied*. To be liable for injuries caused by a defective condition in a roadway, the governmental entity must have actual or constructive knowledge of the defect. *Tucher v. Brothers Auto Salvage Yard, Inc.*, 564 N.E.2d 560, 564 (Ind. Ct. App. 1991), *trans. denied*; *see also Harkness v. Hall*, 684 N.E.2d 1156, 1161 (Ind. Ct. App. 1997), *trans. denied*; *Templeton v. City of Hammond*, 679 N.E.2d 1368, 1372 (Ind. Ct. App. 1997).

A city is not liable for injuries caused by defects in its streets and sidewalks due to the natural accumulation of snow and ice. *Leinbach v. State*, 587 N.E.2d 733, 735-36 (Ind. Ct. App. 1992). If the snow and ice were an obstruction to travel and the city had an opportunity to remove and failed to do so, however, a city could be liable. *Catt v. Bd. of Comm'rs*, 779 N.E.2d 1, 4 (Ind. 2002).

The Indiana Tort Claims Act provides immunity for temporary conditions caused by weather, but does not provide for immunity when the condition is permanent or not caused by the weather. *See Catt*, 779 N.E.2d 1. The Tort Claims Act is codified in Ind. Code ch. 34-13-3 and lists the specific losses for which government entities and employees are not liable.

1945 Duty in General—Plaintiff on Premises of Non-profit Religious Organizations with Actual or Implied Permission

The law required [*defendant*]:

- (1) not to harm [*plaintiff*] intentionally, and
- (2) to warn [*plaintiff*] of a hidden danger on the property if a representative of [*defendant*] had actual knowledge of the hidden danger.

Comments

The law concerning premises liability of nonprofit religious organizations is exclusively contained in Ind. Code ch. 34-31-7. This instruction only applies if the premises in question were owned, operated, or controlled by the nonprofit religious organization and were used primarily for worship services. Ind. Code § 34-31-7-2. Ind. Code § 34-6-2-88.3 defines “nonprofit religious organization” for the purposes of Ind. Code ch. 34-31-7.

The issues of the defendant’s status as a nonprofit religious organization or its use or control of the premises may be undisputed, and therefore a matter of law for determination by the trial court, not the jury. Where material facts are in conflict on any of these issues, it is a matter for the jury to determine under appropriate instructions by the court.

As a general rule, a person’s status on the premises is a matter of law for determination by the trial court, not the jury. *See* Instruction No. 1911 cmt. Where evidence of a material fact is in conflict about whether the plaintiff was on the premises with or without the defendant’s actual or implied permission, it is a matter for the jury to determine under appropriate instructions by the court. *See* Instruction No. 1951.

1947 Duty in General—Plaintiff on Premises of Non-profit Religious Organization Without Actual or Implied Permission

The law only required that [*defendant*] not harm [*plaintiff*] intentionally.

Comments

See Instruction 1945 cmt.

1949 Duty—Non-profit Religious Organizations—Childcare Services

The law required [*defendant childcare provider*] and [*defendant nonprofit religious institution*]:

- (1) not to harm [*plaintiff*] or [*plaintiff's child*] intentionally;
- (2) to warn [*plaintiff*] or [*plaintiff's child*] of a hidden danger on the property if a representative of [*defendant childcare provider*] or [*defendant nonprofit religious institution*] had actual knowledge of the hidden danger; and
- (3) to inspect the property for dangerous hazards and defects, and correct any dangerous hazard or defect within a reasonable period of time after becoming aware of the existence of the dangerous hazard or defect.

Comments

This instruction is appropriate when the premises in question are owned, operated, or controlled by a nonprofit religious organization and are being used for fee-based childcare services. Indiana Code § 34-31-7-3(a) provides that the duties in this instruction are applicable if the premises in question are part of a building that is:

- (1) used primarily for worship services;
- (2) owned, operated, or controlled by a nonprofit religious organization; and
- (3) used for purposes of providing childcare services for which a fee is charged.

In addition, for this Instruction to apply, the customer who purchased childcare services or the customer's child must have entered the premises for the purpose of receiving fee-based childcare services with the actual or implied consent of the childcare provider or nonprofit religious organization. Ind. Code § 34-31-7-3(b).

As a general rule, the issues of the status of the plaintiff and defendant are matters of law for determination by the trial court, not the jury. Where evidence of a material fact is in conflict on one of these issues, it is a matter for the jury to determine under appropriate instructions by the court. Where consent is the issue, *see* Instruction No. 1951.

1951 Permission or Consent—Express or Implied—Non-profit Religious Organizations

[Permission][Consent] to enter or remain on the property of another may be express or implied.

“Express” [permission][consent] is spoken or written [permission][consent].

[Permission][Consent] is “implied” when the conduct of the [owner][occupant] would lead a reasonable person to believe [he][she] has [permission][consent] to enter or remain on the property.

Comments

Compare Ind. Code § 34-31-7-2(2) (using “actual or implied *permission*” with regard to nonprofit religious organizations in general) with Ind. Code § 34-31-7-3(b) (using “actual or implied *consent*” with regard to childcare services on the premises of nonprofit religious organizations) (emphasis added).

B. Animals

1953 Domestic Animals—General Duty

A [person][entity] who [owns][has charge of] a [*domestic animal*] must use reasonable care to prevent the animal from [injuring][harming] [other persons][other animals][property].

Comments

Indiana Code § 15-17-2-26 defines “domestic animal.”

Under common law, owners or keepers of domestic animals must take reasonable care to confine them to the owner’s or keeper’s own premises, or to keep them under control; if the owner or keeper negligently controls domestic animals, he will be liable for damages as a natural consequence of their escape that would be reasonably anticipated because of the natural propensities of the type and breed of animal. *Eisman v. Murdock*, 542 N.E.2d 236 (Ind. Ct. App. 1989).

The legal duty owed by an owner in restraining and confining his animal is reasonable care under the circumstances. *Briggs v. Finley*, 631 N.E.2d 959, 965 (Ind. Ct. App. 1994), *trans. denied*. “The safeguards to be observed and the foresight to be exercised in restraining and confining an animal depend upon the circumstances of the particular case, and are usually matters to be resolved by the fact-finder.” *Id.*

The same duty of reasonable care applies regardless whether the victim was an invitee, licensee, or trespasser on the land where the dog was encountered. *Martin v. Hayduk*, 91 N.E.3d 601, *4 (Ind. Ct. App. 2017). This duty of reasonable care applies not only to cats and dogs, but to all domestic animals. *Gruber v. YMCA of Greater Indianapolis*, 34 N.E.3d 264, 268 (Ind. Ct. App. 2015) (pig); *Einhorn v. Johnson*, 996 N.E.2d 823, 831 (Ind. Ct. App. 2013) (horse), *reh’g denied*.

Confining a dog in a fenced-area is not, as a matter of law, sufficient to prove a dog owner exercised reasonable care to control the dog. *Ross v. Lowe*, 619 N.E.2d 911, 915 (Ind. 1993).

The owner or keeper of a domestic animal must take notice of and use reasonable care to guard against injuries caused by the general propensities of the class to which the animal belongs and particular propensities of the animal itself. *Forrest v. Gilley*, 570 N.E.2d 934 (Ind. Ct. App. 1991). It is the animal’s act, not state of mind, from which the effects of a dangerous propensity must be determined. *Baker v. Weather*, 714 N.E.2d 740, 742 (Ind. Ct. App. 1999).

Under common law, all dogs, regardless of breed or size, are presumed to be harmless domestic animals. *Poznanski v. Horvath*, 788 N.E.2d 1255, 1258 (Ind. 2003). The presumption that a dog is a harmless domestic animal is overcome by evidence of the animal’s specific acts that show the animal’s tendency to endanger the safety of people or property in a given situation; when the owner or keeper has such knowledge, he must use reasonable care to prevent the animal from causing injury or damage. *Ross v. Lowe*, 619 N.E.2d 911 (Ind. 1993).

Like owners of wild animals, if an owner of a domestic animal has notice of the animal’s inclination to commit injuries, the owner is liable, regardless of the amount of care the owner used. *Poznanski*, 788 N.E.2d at 1259. Unlike owners of wild

animals, however, liability based on knowledge of a domestic animal's dangerous propensities are based on negligence, not strict liability; therefore contributory negligence and assumption of the risk may limit liability. *Poznanski*, 788 N.E.2d at 1259.

Where there is no evidence of an owner's actual knowledge that his or her dog has dangerous propensities, the owner may nonetheless be liable, provided there is evidence that the dog's breed has dangerous propensities; this is so even where the dog has never before attacked or bitten anyone. *Poznanski*, 788 N.E.2d at 1259.

Indiana Code § 15-20-1-4 defines criminal offenses based on an owner's failure "to take reasonable steps to restrain" a dog. "Owner" means "the owner of a dog. The term includes a person who possesses, keeps, or harbors a dog." Ind. Code § 15-20-1-2 (2008). An exemption from liability is provided for dogs that were owned by the government and were engaged in "law enforcement or military duties" when the dog bit or attacked another person without provocation. Ind. Code § 15-20-1-6 (2008).

"The unexcused or unjustified violation of a duty proscribed by a statute or ordinance constitutes negligence per se if the statute or ordinance is intended to protect the class of persons in which the plaintiff is included and to protect against the risk of the type of harm which has occurred as a result of its violation." *Plesha v. Edmonds ex rel. Edmonds*, 717 N.E.2d 981, 986 (Ind. Ct. App. 1999), *reh'g denied, trans. denied*.

1954 Domestic Animals—Negligent Containment

[*Defendant*] is responsible for damages caused by [his][her] escaped [*domestic animal*] only if:

- (1) [*Defendant*] knew or should have known that the confinement would fail; or
- (2) [*Defendant*] knew the [*domestic animal*] escaped and took no reasonable steps to recapture it.

Comments

Indiana Code § 15-17-18-8 (2008) provides:

- (a) Except as provided in subsection (b), a person responsible for livestock or poultry who knowingly or intentionally permits the livestock or poultry to run at large commits a Class B misdemeanor.
- (b) Subsection (a) does not apply to a person who keeps livestock on property by means of a cattle guard or other device under IC 8-17-1-2.1.

The owner or keeper of livestock must use ordinary care to restrain the livestock from straying onto a highway. *Eisman v. Murdock*, 542 N.E.2d 236 (Ind. Ct. App. 1989); *Thompson v. Lee*, 402 N.E.2d 1309 (Ind. Ct. App. 1980); *Corey v. Smith*, 233 Ind. 452, 120 N.E.2d 410 (1954).

That animals were loose is insufficient to prove negligence. *Greathouse v. Armstrong*, 601 N.E.2d 419, 428 (Ind. Ct. App. 1992), *reh'g denied, summarily aff'd* 616 N.E.2d 364, 365 (Ind. 1993). An owner is liable for damages caused by an escaped domestic animal only if: (1) the owner knew or should have foreseen that the type of confinement would be ineffective, or (2) the owner knew that the animal escaped and he did not try to re-confine it. *Briggs v. Finley*, 631 N.E.2d 959, 965 (Ind. Ct. App. 1994), *trans. denied*; *Cochran v. Phillips*, 573 N.E.2d 472, 474 (Ind. Ct. App. 1991), *reh'g denied, trans. dismissed*.

1955 Domestic Animals—Known to be Dangerous

A [person][entity] who knows or by reasonable care should have known that a domestic animal [he][she][it][owns][has charge of] is vicious or dangerous to [people][other animals][property] must use reasonable care under the circumstances to prevent the animal from causing injury or damage.

Comments

The owner or keeper of a domestic animal must take notice of and use reasonable care to guard against injuries caused by the general propensities of the class to which the animal belongs and particular propensities of the animal itself. *Forrest v. Gilley*, 570 N.E.2d 934 (Ind. Ct. App. 1991). It is the animal's act, not state of mind, from which the effects of a dangerous propensity must be determined. *Baker v. Weather*, 714 N.E.2d 740, 742 (Ind. Ct. App. 1999).

Under common law, all dogs, regardless of breed or size, are presumed to be harmless domestic animals. *Poznanski v. Horvath*, 788 N.E.2d 1255, 1258 (Ind. 2003). The presumption that a dog is a harmless domestic animal is overcome by evidence of the animal's specific acts that show the animal's tendency to endanger the safety of people or property in a given situation; when the owner or keeper has such knowledge, he must use reasonable care to prevent the animal from causing injury or damage. *Ross v. Lowe*, 619 N.E.2d 911 (Ind. 1993).

Like owners of wild animals, if an owner of a domestic animal has notice of the animal's inclination to commit injuries, the owner is liable, regardless of the amount of care the owner used. *Poznanski*, 788 N.E.2d at 1259. Unlike owners of wild animals, however, liability based on knowledge of a domestic animal's dangerous propensities are based on negligence, not strict liability; therefore contributory negligence and assumption of the risk may limit liability. *Poznanski*, 788 N.E.2d at 1259.

Where there is no evidence of an owner's actual knowledge that his or her dog has dangerous propensities, the owner may nonetheless be liable, provided there is evidence that the dog's breed has dangerous propensities; this is so even where the dog has never before attacked or bitten anyone. *Poznanski*, 788 N.E.2d at 1259.

The keeper of an animal with a propensity to bite people who knows, or by the use of reasonable care could have known, of the animal's dangerous propensities, is liable for injuries caused by the animal's vicious acts to another faultless person. *Williams v. Pohlman*, 146 Ind. App. 523, 257 N.E.2d 329 (1970); *Artificial Ice & Cold Storage Co. v. Martin*, 102 Ind. App. 74, 198 N.E. 446 (1935).

If an owner delivers a domestic animal to another person, the owner must inform that other person of the animal's vicious characteristics known to the owner or ascertainable by the use of reasonable care; if the owner informs that person of the animal's vicious characteristics, or if the person knows or before injury ascertains the viciousness, the owner is not liable. *Williams*, 257 N.E.2d 329; *Artificial Ice & Cold Storage Co.*, 198 N.E. 446.

"[F]oreseeability and public policy militate strongly against imposing a duty of care upon a landlord with respect to animals owned or kept by his or her tenants by

virtue of entering into a lease with the knowledge that the tenant owns a dog with vicious tendencies." *Morehead v. Deitrich*, 932 N.E.2d 1272, 1279 (Ind. Ct. App. 2010), *trans. denied*.

To prevail in claim against landowners, plaintiffs had to demonstrate landowners "retained control over the property" and "had actual knowledge that the Great Danes had dangerous propensities." *Baker v. Weather ex rel. Weather*, 714 N.E.2d 740, 742 (Ind. Ct. App. 1999).

A dangerous propensity is "a propensity or tendency of an animal to do any act which might endanger the safety of person or property in a given situation." *Byers v. Moredock*, 31 N.E.3d 1016, 1021 (Ind. Ct. App. 2015) (quoting *Baker v. Weather ex rel. Weather*, 714 N.E.2d 740, 742 (Ind. Ct. App. 1999)).

"[P]ossession or ownership of land from which an animal strays is not sufficient to make the landowner liable, so long as the landowner is not the keeper of such animal. This is and has always been the law in Indiana." *Blake v. Dunn Farms, Inc.*, 413 N.E.2d 560, 563 (Ind. 1980) (citing *Cook v. Morea*, 33 Ind. 497 (1870)).

Landlords have no "duty to ensure proper or adequate confinement or control of" a dog or to monitor that tenants "properly or adequately confined or controlled" a dog. *Byers v. Moredock*, 31 N.E.3d at 1023.

1956 Strict Liability for Some Unprovoked Dog Bites

[Defendant] is liable for all damages suffered by [plaintiff] as a result of being bitten by [defendant]'s dog, if:

- (1) [plaintiff] was in a location where [plaintiff] was required to perform a duty imposed by [Indiana law][U.S. law][U.S. postal regulations], and
- (2) [plaintiff] was acting peaceably; and
- (3) the dog bit without being provoked.

Comments

Indiana Code § 15-20-1-3 (2008) (formerly Ind. Code § 15-5-12-1) provides:

- (a) If a dog, without provocation, bites a person:

- (1) who is acting peaceably; and
- (2) who is in a location where the person may be required to be in order to discharge a duty imposed upon the person by:
 - (A) the laws of Indiana;
 - (B) the laws of the United States; or
 - (C) the postal regulations of the United States;

the owner of the dog is liable for all damages suffered by the person bitten.

- (b) The owner of a dog described in subsection (a) is liable for damages even if:

- (1) the dog has not previously behaved in a vicious manner; or
- (2) the owner has no knowledge of prior vicious behavior by the dog.

“Owner” means “the owner of a dog. The term includes a person who possesses, keeps, or harbors a dog.” Ind. Code § 15-20-1-2 (2008).

Indiana Code § 15-20-1-3 alters the common law framework for dog-bite liability when a letter carrier is the victim. *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 275 (Ind. 2003) (analyzing prior version of statute with nearly identical language). The legislature explicitly removed the common law presumption that a dog is harmless until it acts otherwise. *Id.* “The net result of eliminating the presumption of canine harmlessness is that the statute imposes strict liability on dog owners for bites of letter carriers and other public servants in the course of their duties.” *Id.* at 276.

1957 Inherently Dangerous Animals

A [person][entity] who [owns][has charge of] an inherently dangerous animal, such as a [lion, tiger, bear, etc.], is liable for any damages caused by the animal.

Comments

When wild animals are kept as pets, an owner is liable for injuries caused by the animal. *Poznanski v. Horvath*, 788 N.E.2d 1255, 1259 (Ind. 2003). This is so even if the owner had no prior knowledge of the animal's propensity to cause harm, and even if the owner has exercised the utmost care in preventing harm. *Poznanski*, 788 N.E.2d at 1259. In essence, strict liability is imposed on owners of wild animals. *Poznanski*, 788 N.E.2d at 1259.

The Court of Appeals adopted the Restatement 2d Torts approach (§ 507 read in conjunction with §§ 508, 510–512, 515, 517) in wild animal cases which provides for various exceptions and/or defenses to the strict liability wild animal rule. *Irvine v. Rare Feline Breeding Ctr.*, 685 N.E.2d 120 (Ind. Ct. App. 1997) (citing Restatement 2d Torts §§ 507–508, 510–512, 515, 517).

See also Indiana Code § 15-20-1-5 (2014), creating special rules for the securing of a “coydog” or a “wolf hybrid.”

CHAPTER 2100

PRODUCT LIABILITY: STRICT LIABILITY

SYNOPSIS

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**Prod. Liability:
Strict Liab.**

2101 Issues for Trial; Burden of Proof

The Plaintiff, _____, sued _____, the Defendant.

[*Plaintiff*] claims that [*defendant*][*insert claimed action(s)*]. [*Plaintiff*] must prove [his][her][its] claims by the greater weight of the evidence.

[*Defendant*] denies [*plaintiff*]'s claims. [*Defendant*] is not required to disprove [*plaintiff*]'s claims.

[*Defendant*] has claimed certain defenses. [*Defendant*] must prove [his][her][its] defense[s] of [*specify affirmative defense(s)*] by the greater weight of the evidence.

[(*Plaintiff*) also claims (he)(she)(it) is entitled to an award of punitive damages because (*insert brief statement of claim for punitive damages*). (*Plaintiff*) must prove this claim by clear and convincing evidence.]

Comments

This instruction should be modified to set forth all claims, counterclaims, and cross claims.

Jury Rule 20 and Trial Rule 51(A) require that the trial court give preliminary instructions as to the issues for trial and the burden of proof. The trial court and counsel should carefully prepare a preliminary instruction setting out the issues for trial in narrative form, including all claims, counterclaims, and cross claims. The instruction should be brief, accurate, conversational, and as non-technical as possible.

If a pretrial order has been entered, *see* T.R. 16(J), the Committee recommends that the instruction be drafted based on that order, which supplants the allegations in the pleadings, but should not be rigidly or pointlessly applied. *See Vlach v. Goode*, 515 N.E.2d 569 (Ind. Ct. App. 1987); 62 Am. Jur. 2d PreTrial Conference § 29 at 661 (1972).

Whether a pretrial order has been entered or not, the Committee recommends against reading the pleadings to the jury.

2103 Product Liability Against Manufacturer—Elements—Burden of Proof

To recover damages from [defendant], [plaintiff] must prove each of the following by the greater weight of the evidence:

- (1) [defendant] manufactured the [product] and was in the business of selling [products];
- (2) [defendant] sold, leased, or otherwise put the [product] into the stream of commerce;
- (3) the [product] had a defect unreasonably dangerous to [users or consumers][a user's or consumer's property];
- (4) should have reasonably been expected to be harmed by the defect [plaintiff] was a user or consumer of the [product] and was in a class of persons [defendant] should have reasonably expected to be subject to the harm caused by the defective condition;
- (5) the [product] was expected to and did reach [plaintiff] without substantial alteration of the condition in which [defendant] sold the [product]; and
- (6) the defective condition of the [product] was a responsible cause of physical harm to [plaintiff][(plaintiff)'s property].

Comments

Indiana Code § 34-20-2-1 states:

Except as provided in section 3 of this chapter [which limits strict liability claims to manufacturers], a person who sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous to any user or consumer or to the user's or consumer's property is subject to liability for physical harm caused by that product to the user or consumer or to the user's or consumer's property if:

- (1) that user or consumer is in the class of persons that the seller should reasonably foresee as being subject to the harm caused by the defective condition;
- (2) the seller is engaged in the business of selling the product; and
- (3) the product is expected to and does reach the user or consumer without substantial alteration in the condition in which the product is sold by the person sought to be held liable under this article.

Indiana Code § 34-20-8-1 states that the jury should use the Comparative Fault Act to compare the fault of the injured person and of all others who caused or contributed to cause the harm.

Indiana Code § 34-6-2-45(a) provides, however, that a different definition of fault be used in products liability cases:

an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes the following: (1)

Unreasonable failure to avoid an injury or to mitigate damages[; and] (2) A finding under IC 34-20-2 (or IC 33-1-1.5-3 before its repeal) that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.

This product liability definition of fault differs from the general comparative fault definition in that the product liability definition does not include “unreasonable assumption of risk not constituting an enforceable express consent” or “incurred risk,” but includes strict liability as a type of fault to be compared with the fault of all others who caused or contributed to cause the harm. *Compare* Ind. Code § 34-6-2-45(b) *with* Ind. Code § 34-6-2-45(a).

2105 Responsible Cause (Proximate Cause)—Definition

A person's conduct is legally responsible for causing [an injury][property damage][a death] if:

- (1) the [injury][property damage][a death] would not have occurred without the conduct, and
- (2) the [injury][property damage][a death] was a natural, probable, and foreseeable result of the conduct.

This is called a "responsible cause."

[There can be more than one responsible cause for an injury.]

Comments

Scholars identify the use of legal jargon and arcane legalese as the most serious flaws of contemporary jury instructions. John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1209 (2002). In fact, in one study of 14 jury instructions, the proximate cause instruction produced proportionally the most misunderstanding among laypersons. The study revealed that jurors mistake "proximate cause" for "approximate cause," "estimated cause," or some fabrication. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979); see also Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L.J. 456, 468 (1962) ("proximate cause" is frequently misinterpreted to mean "probable" or "approximate cause"); James D. Wascher, *The Importance of Juries: The Long March Toward Plain English Jury Instructions*, 19 Chicago Bar Ass'n Record 50, 50-51 (2005) (a Chicago judge reported that he presided over a trial in which the jury sent him a note asking whether proximate cause meant "it's pretty close to the cause").

Prosser and Keeton say that proximate cause is "is an unfortunate word, which places entirely the wrong emphasis on the factor of physical or mechanical closeness." Prosser & Keeton, *The Law of Torts* § 42. They even imply that it was a sin to have coined the term "proximate cause" in the first place. Prosser & Keeton, *The Law of Torts* § 42. ("The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins.") The Committee has determined that use of a term so likely to be misunderstood is against the policy behind clear jury instructions.

There are two types of causation—causation in fact and proximate cause. See, e.g., Prosser & Keeton, *The Law of Torts* §§ 41 (causation in fact), 42 (proximate cause) (5th ed. 1984). Causation in fact is the threshold question of whether "but for" the defendant's negligent conduct, plaintiff's harm would not have occurred. Or, to put it another way, plaintiff's harm would not have occurred without the defendant's conduct. *Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981) (citing W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971); 21 I.L.E. Negligence § 62 (1959)). Because the consequences of an act go forward to eternity and back before the dawn of human events, there must also be "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has

suffered.” Prosser & Keeton, *The Law of Torts* § 41. This is proximate cause, and it boils down to “whether the conduct has been so significant and important a cause that the defendant should be legally responsible.” Prosser & Keeton, *The Law of Torts* § 41. Prosser and Keeton therefore suggest that either “responsible cause” or “legal cause” would be a more appropriate term. Prosser & Keeton, *The Law of Torts* § 41. Because use of the term “legal cause” might suggest to the jury that there could also be an “illegal cause,” the Committee selected “responsible cause.”

The Indiana Supreme Court has held that a proximate cause instruction is not *required* to refer to “but for” causation, “so long as the instructions as a whole adequately convey the law in this area.” *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 301 (Ind. 2009). To ensure that the instructions as a whole *do* adequately convey both proximate cause and causation in fact, the Committee has included both concepts in this one instruction. Subpart (1) of the instruction (“the injury would not have occurred without the conduct”) instructs on causation in fact. And because the Indiana Supreme Court has explained proximate cause as the natural and probable consequence of the conduct, subpart (2) of the instruction (“the injury was a natural and probable result of the conduct”) instructs on proximate cause. “A negligent act is said to be the proximate cause of an injury ‘if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.’ ” *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003) (quoting *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000)).

Plaintiff has the burden of proving causation in fact by a preponderance of the evidence. *Turner v. Davis*, 699 N.E.2d 1217 (Ind. Ct. App. 1998) (causation in fact); *Carter v. Aetna Life Ins. Co.*, 217 Ind. 282, 27 N.E.2d 75 (1940) (proximate cause). What is the proximate cause of the injury is ordinarily a question of fact for the jury that becomes a question of law when only a single conclusion can be drawn from the facts. *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101 (Ind. Ct. App. 1999).

The court is not required to repeat the substance of an instruction defining proximate cause, and outlining the necessity of establishing it, in every general instruction. *Swallow Coach Lines, Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938).

The “conduct” discussed in this Instruction includes acts and omissions. *See, e.g.*, Instruction Nos. 909 and 1107.

There can be more than one responsible cause for an injury. *See, e.g.*, *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006) (“An injury may have more than one proximate cause.”); *Board of Comm’rs v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992) (“There may be more than one proximate cause of an event.”); *Krohn v. Shidler*, 140 Ind. App. 175, 185 (1966) (“It is not necessary that such negligence be the sole proximate cause.”). The bracketed sentence about multiple responsible causes should be given when it is an issue in the case.

2106 Foreseeable—Defined

[An injury][Property damage][A death] is “foreseeable” when a person should realize that [his][her] act or failure to act might cause harm.

Comments

In the context of proximate/responsible cause, the question is whether the injury “is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.” *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 108 (Ind. 2002) (citing *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000)). “The determination of what is reasonably foreseeable is not judged by the subjective opinions of those involved, but is based upon the standard of due care in avoiding a result which might reasonably have been anticipated in the ordinary experience of people.” *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 917–18 (Ind. Ct. App. 2001) (citing *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101, 1105 (Ind. Ct. App. 1999)). When some harm is foreseeable, a person is responsible for any injury even if the extent of the injury was unforeseeable. *Bolin v. Wingert*, 764 N.E.2d 201, 207–08 (Ind. 2002). “If the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor’s negligence.” *Hampton v. Moistner*, 654 N.E.2d 1191, 1194 (Ind. Ct. App. 1995).

2107 Product—Definition

A “product” is a physical object that is personal property at the time it is [sold][transferred] by the seller to another person or entity.

Comments

Indiana Code § 34-6-2-114(a) defines “product” as “any item or good that is personalty at the time it is conveyed by the seller to another party.”

The Product Liability Act does not apply to transactions that are predominately for the sale of a service. Ind. Code § 34-6-2-114(b); *Lenhardt Tool & Die Co. v. Lumpe*, 703 N.E.2d 1079, 1085 (Ind. Ct. App. 1998). It can be difficult to distinguish between a product and a service. See William C. Powers, Jr., *Distinguishing Between Products and Services in Strict Liability*, 62 N.C.L. Rev. 415 (1984). The issue is fact-specific. See, e.g., *Hill v. Rieth-Riley Constr. Co.*, 670 N.E.2d 940 (Ind. Ct. App. 1996), *overruled on other grounds by Peters v. Forster*, 804 N.E.2d 736, 740 (Ind. 2004) (because defendant’s installation of guardrails was part of a larger contract to resurface highway, the transaction was predominately for the sale of services); *Marsh v. Dixon*, 707 N.E.2d 998 (Ind. Ct. App. 1999) (purchase of a ticket to ride in a wind tunnel machine was the purchase of a service); *Sapp v. Morton Bldgs. Inc.*, 973 F.2d 539 (7th Cir. 1992) (because interior structures were custom fit, rather than prefabricated, contractor’s remodeling of barn was predominately for the sale of services); *Whitaker v. T.J. Snow Co.*, 151 F.3d 661 (7th Cir. 1998) (because defendant only refurbished machine, did not manufacture any significant component parts, and mainly installed the components according to plaintiff’s specifications, and because the contract specified that defendant was not to rebuild the machine, that contract was predominately for the sale of services).

The predominant thrust test used to determine whether a transaction is a sale of goods governed by Uniform Commercial Code can also be useful in determining whether a transaction is predominantly for products or services within the scope of the Product Liability Act. *Dow Chem. Co. v. Ebling*, 723 N.E.2d 881 (Ind. Ct. App. 2000), *adopted in relevant part but vacated as to preemption by* 753 N.E.2d 633 (Ind. 2001). In applying this test, a court should consider these factors: (1) the terms describing the performance required of the parties and the words used to describe the relationship between the parties; (2) the circumstances of the parties and the primary reason they entered into the contract; (3) the final product the purchaser bargained to receive, and whether it may be described as a good or a service; and (4) the costs involved for the goods and services, and whether the purchaser was charged for a good, or a price based on both goods and services. *Dow Chem. Co.*, 723 N.E.2d at 904–05.

2109 User or Consumer—Definition

“User or consumer” means:

- (1) a purchaser;
- (2) a person who used or consumed a product;
- (3) a person who possessed or controlled a product, while acting for the person injured by the product; or
- (4) a bystander who was injured by a product, and who would reasonably be expected to be near the product during its reasonably expected use.

Comments

Ind. Code § 34-6-2-29 defines “consumer” for purposes of the Product Liability Act as: “(1) a purchaser; (2) any individual who uses or consumes the product; (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.”

“User” has the same definition as “consumer” under the Act. Ind. Code § 34-6-2-147. A person who completes or assembles a product before its retail sale is not a user under the Act. *Davis v. Lippert Components Mfg, Inc.*, 95 N.E.3d 200 (Ind. Ct. App. 2018)

Prod. Liability:
Strict Liab.

2111 Physical Harm—Definition

“Physical harm” means:

- (1) bodily injury;
- (2) death;
- (3) loss of services resulting from bodily injury or death; or
- (4) sudden, major damage to [plaintiff]’s property other than damage to the product itself.

“Physical harm” does not include gradual damage to property, or the economic losses which arise from the gradual damage.

Comments

Indiana Code § 34-6-2-105(a) defines physical harm as “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.” Subsection (b) states, “The term does not include gradually evolving damage to property or economic losses from such damage.”

“Sudden, major damage” is damage that happens quickly and unexpectedly, and is significant in scope. *Reed v. Central Soya Co.*, 621 N.E.2d 1069, 1076 (Ind. 1993) (damages from contaminated feed occurred gradually and was not “sudden, major damage”); *see also Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078, 1088 (Ind. 1993) (damages to watermelon from blighted watermelon seeds evolved gradually over a period of months was not “sudden, major damage”); *Interstate Cold Storage, Inc. v. General Motors Corp.*, 720 N.E.2d 727 (Ind. Ct. App. 1999) (when truck driver heard a strange sound, saw smoke coming from the truck, pulled over, then saw flames near the engine, the damage was sudden and major).

Strict liability in tort does not apply to claims of damage to product itself. *Reed*, 621 N.E.2d at 1074; *Martin Rispens & Son*, 621 N.E.2d 1078. The Products Liability Act bars a tort action when no damage to person or other property is present. *Progressive Ins. Co. v. General Motors*, 749 N.E.2d 484 (Ind. 2001) (fires allegedly caused by vehicle defects that damaged the vehicles but not any person or property did not cause “physical harm” within the meaning of the act); *see also Interstate Cold Storage, Inc.*, 720 N.E.2d 727.

The Act provides a manufacturer of a *product* is liable for physical harm caused by that *product* to the user’s property. *See* Ind. Code § 34-20-2-1. Although it is possible in general terms for the product to also be the property of the user, the Act does not use the terms “product” and “property” interchangeably. The language of the Act contemplates the defective product acting on some other property causing some harm to it. *Interstate Cold Storage, Inc.*, 720 N.E.2d 727; *I/N Tek v. Hitachi, Ltd.*, 734 N.E.2d 584 (Ind. Ct. App. 2000) (damage to the product itself was insufficient to support recovery under the Product Liability Act, even if the damage was sudden and major); *Hitachi Constr. Mach. Co. v. Amax Coal Co.*, 737 N.E.2d 460 (Ind. Ct. App. 2000) (“other property” is that which is wholly outside and apart from the product itself).

In *State Farm Mut. Auto. Ins. Co. v. Jakupko*, 881 N.E.2d 654 (Ind. 2008), the

Indiana Supreme Court concluded, that in a negligence case, the definition of "bodily injury" included emotional distress damages, but only if that distress arose from a bodily touching or direct physical impact. *Jakupko* at 658–59. See Chapter 2900 for more discussion on emotional distress damages.

2113 Seller—Definition

A “seller” is a person who sells or leases products to others for resale, use, or consumption.

Comments

Indiana Code § 34-6-2-136 defines “seller” as “a person engaged in the business of selling or leasing a product for resale, use, or consumption.”

2115 Manufacturer—Definition

A “manufacturer” is a [person][entity][who][that] designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the product or part is sold to a user or consumer.

Comments

Indiana Code § 34-6-2-77 defines “manufacturer” as “a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer.”

2117 Unreasonably Dangerous—Definition

A product is “unreasonably dangerous” if it exposes a user or consumer to a risk of physical harm not contemplated by an ordinary consumer.

An “ordinary consumer” is one who has ordinary knowledge about the product’s characteristics.

Comments

Indiana Code § 34-6-2-146 states that “unreasonably dangerous” “refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases the product with the ordinary knowledge about the product’s characteristics common to the community of consumers.”

Under the Product Liability Act, the requirement that a product be in a defective condition focuses on the product itself while the requirement that the product be “unreasonably dangerous” focuses on the reasonable contemplations and expectations of consumer. *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 814 (Ind. Ct. App. 1995). Both must exist—the product must be in a defective condition and be unreasonably dangerous—for liability to attach in a product liability case. *Welch*, 651 N.E.2d at 814 (disposable butane cigarette lighter did not function in manner not expected by an ordinary consumer (an adult) and was not “unreasonably dangerous”, even though a lighter can be potentially dangerous in hands of child); *see also Natural Gas Odorizing v. Downs*, 685 N.E.2d 155 (Ind. Ct. App. 1997) (failure to provide adequate warning about the odor fade of odorant mixed with natural gas made the product both defective and unreasonably dangerous); *Rupert v. Machine Tool Corp.*, 661 N.E.2d 826 (Ind. Ct. App. 1995) (while chuck that got stuck might have been defective, and risk of injury when trying to open it might have been dangerous, that risk is normal and within a consumer’s ordinary knowledge about product’s characteristics); *Smith v. Amli Realty Co.*, 614 N.E.2d 618 (Ind. Ct. App. 1993) (although weight machine was potentially dangerous to children, it was not unreasonably dangerous, because it functioned properly as exercise equipment).

2119 Seller as “Manufacturer”—Definition

A “seller” of products is held to the same standard as a “manufacturer,” if any of the following apply:

- (1) the seller has actual knowledge of a defect in the product;
- (2) the seller creates and gives a manufacturer specifications for producing the products that are relevant to the alleged defect;
- (3) the seller exercises significant control over all or a portion of the manufacturing process;
- (4) the seller alters or modifies the product in a significant manner after the product comes into the seller’s possession and before it is sold to the ultimate user or consumer;
- (5) the seller is owned in whole or significant part by the manufacturer; or
- (6) the seller owns the manufacturer, in whole or in significant part.

[A seller who discloses the name of the actual manufacturer of a product is not a “manufacturer” merely because the seller places or has placed a private label on a product.]

Comments

Indiana Code § 34-6-2-77(a) states, that a manufacturer includes a seller who:

- (1) has actual knowledge of a defect in a product;
- (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process;
- (3) alters or modifies the product in any significant manner after the product comes into the seller’s possession and before it is sold to the ultimate user or consumer;
- (4) is owned in whole or significant part by the manufacturer; or
- (5) owns in whole or significant part the manufacturer.

Subsection (b) further states, “A seller who discloses the name of the actual manufacturer of a product is not a manufacturer under this section merely because the seller places or has placed a private label on a product.”

If this instruction is given, the court should also consider the applicability of Instruction No. 2115.

The court should include the last paragraph of the instruction (the language in brackets) in a products negligence case if the seller is treated as the manufacturer.

2121 Defective Products—Defective Condition

A product is in a defective condition if, when it is [transferred][sold] by the seller to another [person][entity], its condition:

- (1) would not be anticipated by a reasonable, expected user or consumer, and
- (2) is unreasonably dangerous to that user or consumer when [he][she] uses the product in a reasonably expected way.

Comments

There are three types of product defects: manufacturing, design and warning. *Whitted v. General Motors Corp.*, 58 F.3d 1200 (7th Cir. 1995).

Indiana Code § 34-20-4-1 states that a product is in a defective condition if, at the time it is conveyed by the seller to another party, it is in a condition:

- (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and
- (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.

2125 Reasonable Care Not a Defense

It is not a defense that [*defendant*] exercised all reasonable care in the manufacture and preparation of the [*product*].

Comments

Indiana Code § 34-20-2-2 states that a manufacturer is strictly liable under Ind. Code § 34-20-2-1 (manufacturing defect cases) even though the seller has exercised all reasonable care in the manufacture and preparation of the product.

The statute goes on to state that in design defect or failure to warn or instruct cases, the plaintiff must “establish that the manufacturer or seller failed to exercise reasonable care under the circumstances in designing the product or in providing the warnings or instructions.”

2129 Lack of Privity Not a Defense

It is not a defense that [plaintiff] did not buy the [product] from or enter into a contract with [defendant].

Comments

Indiana Code § 34-20-2-2 states that a manufacturer is strictly liable under Ind. Code § 34-20-2-1 (manufacturing defect cases) even though the user or consumer has not bought the product from or entered into any contractual relation with the seller.

2131 Defense—Misuse of Product

[Defendant] claims that misuse of the [product] caused [plaintiff]'s damages.

To assign fault against [plaintiff][named non-party] for misuse, [defendant] must prove the following by the greater weight of the evidence:

- (1) [plaintiff][named non-party] used the [product] in a manner that was not reasonably expected by [defendant] at the time the [product] was sold; and
- (2) this misuse of the [product] was a responsible cause of the [harm][damage-][plaintiff] suffered.

Comments

Indiana Code § 34-20-6-4 states that a plaintiff or other person's misuse of the product is a defense if that misuse was not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product.

Courts have further defined misuse as use for a purpose or in a manner not foreseeable by the manufacturer. *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1030 (Ind. Ct. App. 2003).

A consumer who uses a product in contravention of a legally sufficient warning, misuses the product, and in the context of the defense of incurred or assumed risk, is subject to the defense of misuse. *Barnard*, 790 N.E.2d at 1030.

In *Morgen v. Ford Motor Co.*, 797 N.E.2d 1146 (Ind. 2003), the Indiana Supreme Court expressly declined to decide whether misuse is a complete defense to a product liability claim. The committee therefore relied on the latest appellate case of *Barnard*, 790 N.E.2d 1023, which applies the Comparative Fault Act to product liability claims, even those based on strict liability. A plaintiff's misuse of a product therefore falls within the statutory definition of "fault" as an act or omission that is intentional toward the property of others, including an unreasonable failure to avoid an injury or to mitigate damages. Ind. Code §§ 34-6-2-45(a); 34-20-8-1.

2133 Defense—Known Defect and Danger

[Defendant] claims [plaintiff] knew of the defect and danger of the [product].

[Plaintiff] cannot recover if [defendant] proves each of the following by the greater weight of the evidence:

- (1) [plaintiff] knew of the [product]’s defect;
- (2) [plaintiff] was aware of the danger in the [product]; and
- (3) [plaintiff] nevertheless used [product] and was injured.

Comments

Indiana Code § 34-20-6-3 provides that it is a defense that the plaintiff-user/consumer:

- (1) knew of the defect;
- (2) was aware of the danger in the product; and
- (3) nevertheless proceeded to make use of the product and was injured.

In dicta, *Vaughn v. Daniels Co.*, 841 N.E.2d 1133, 1146 (Ind. 2006), states that incurred risk is a complete bar to negligence claims under the Products Liability Act. See also, Joseph R. Alberts, In *Survey of Recent Developments in Indiana Product Liability Law*, 38 Ind. L.R. 1205 at 1249 (2005) (relying on *Vaughn v. Daniels Co.*, 777 N.E.2d 1110 (Ind. Ct. App. 2002), *vacated and decided on different grounds in Vaughn v. Daniels Co.*, 841 N.E.2d 1133 (Ind. 2006)).

The Committee also acknowledges that many cases discuss the “open and obvious” rule, which is a lesser standard than incurred risk as defined by the Products Liability Act in Ind. Code § 34-20-6-3. The Committee questions whether the open and obvious rule is even applicable to products liability cases, or whether it is merely a vehicle used to prove incurred risk or whether a product was unreasonably dangerous in the first instance.

2135 Defense—Modification/Alteration of Product

[*Defendant*] claims that modification or alteration of the [*product*] caused [*plaintiff*]'s damages.

To assign fault against [*plaintiff*][*named non-party*] for modification or alteration, [*defendant*] must prove the following by the greater weight of the evidence:

- (1) any person modified or altered the [*product*] after it was delivered to the initial user or consumer;
- (2) the modification or alteration was not reasonably expected by [*defendant*] at the time the [*product*] was sold; and
- (3) the modification or alteration of the [*product*] was a responsible cause of the [*harm*][*damage*][*plaintiff*] suffered.

Comments

Indiana Code § 34-20-6-5 provides that modification or alteration of the product after the product's delivery to the initial user or consumer is a defense "if the modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller."

Indiana Code § 34-20-6-5, uses the phrase "is the proximate cause." The model instruction uses "a responsible cause," because there can be more than one proximate cause, and because the committee changed the term proximate cause to responsible cause.

2151 Crashworthiness—Products Liability Against Manufacturer (Strict Liability)—Issues for Trial; Burden of Proof

[**(*Plaintiff*) claims that (he)(she)(it) was involved in (*briefly describe the event as alleged by plaintiff*) on (insert date).**]

[*Plaintiff*] claims that [*defendant*] manufactured the [*name the product or component claimed to be defective*] in a defective condition. [*Plaintiff*] further claims that although the defective condition of the [*name the product or component claimed to be defective*] did not cause the [collision][incident] in which [*plaintiff*] was involved, the physical harm to [*plaintiff*][(*plaintiff*)'s property] was greater than the physical harm would have been had the [*name the product or component claimed to be defective*] not been in a defective condition.

[*Defendant*] denies [*plaintiff*]'s claims. [*Defendant*] is not required to disprove [*plaintiff*]'s claims.

[*Defendant*] has claimed certain defenses. [*Defendant*] must prove [his][her][its] defense[s] of [*specify affirmative defense(s)*] by the greater weight of the evidence.

[(*Plaintiff*) also claims (he)(she)(it) is entitled to an award of punitive damages because (*insert brief statement of claim for punitive damages*). (*Plaintiff*) must prove this claim by clear and convincing evidence.]

Comments

Use language bracketed by “**” only if the jury has not been previously instructed regarding the collision or other incident in which plaintiff claims to have been involved.

Under the doctrine of crashworthiness a motor vehicle manufacturer may be liable in negligence or strict liability for injuries sustained in a motor vehicle accident where a manufacturing or design defect, though not the cause of the accident, caused or enhanced the injuries. *Camacho v. Honda Motor Co.*, 741 P.2d 1240, (Colo. 1987), *cert. dismissed*, 485 U.S. 901 (1988). The enhanced injury doctrine has been applied to automobiles, motorcycles, airplanes, snowmobiles, front-end loaders, pleasure boats, and riding lawnmowers and tractors. *Tafoya v. Sears Roebuck and Co.*, 884 F.2d 1330 (10th Cir. 1989). The Indiana Supreme Court has recognized the crashworthiness theory as a viable cause of action. *Miller v. Todd*, 551 N.E.2d 1139 (Ind. 1990).

In a crashworthiness case alleging enhanced injuries under the Indiana Products Liability Act, the finder of fact shall apportion fault to the person suffering physical harm when that alleged fault is a (proximate) responsible cause of the harm for which damages are being sought. *Green v. Ford Motor Co.*, 942 N.E.2d 791 (Ind. 2011).

2153 Crashworthiness—Products Liability Against Manufacturer (Strict Liability)—Elements—Burden of Proof

To recover damages from [defendant], [plaintiff] must prove each of the following by the greater weight of the evidence:

- (1) [defendant] manufactured the [product] and was in the business of selling [products];
- (2) [defendant] sold, leased, or otherwise put the [product] into the stream of commerce;
- (3) the [product] was in a defective condition unreasonably dangerous to [users or consumers][a user's or consumer's property];
- (4) [plaintiff] was a user or consumer of the [product] and was in a class of persons [defendant] should have reasonably expected to be subject to the harm caused by the defective condition;
- (5) the [product] was expected to and did reach [plaintiff] without substantial alteration of the condition in which [defendant] sold the [product];
- (6) the physical harm to [plaintiff][(plaintiff)'s property] was greater than the physical harm would have been had the [product] not been in a defective condition; and
- (7) the defective condition of the [product] was a responsible cause of the enhanced physical harm to [plaintiff][(plaintiff)'s property].

Comments

In a crashworthiness case alleging enhanced injuries under the Indiana Products Liability Act, the finder of fact shall apportion fault to the person suffering physical harm when that alleged fault is a (proximate) responsible cause of the harm for which damages are being sought. *Green v. Ford Motor Co.*, 942 N.E.2d 791 (Ind. 2011).

Indiana Code § 34-20-8-1 states that the jury should use the Comparative Fault Act to compare the fault of the injured person and of all others who caused or contributed to cause the harm. Indiana Code § 34-6-2-45(b) further specifies that the Comparative Fault Act covers all types of fault (including intentional acts). Thus, instructions for cases involving both negligent and intentional acts can include the comparative fault verdict forms, which can name the intentional actors as parties or nonparties, depending on the circumstances of the case.

Instruction Nos. 941 and 943 cover comparative fault apportionment.

CHAPTER 2300

PRODUCT LIABILITY: NEGLIGENCE

SYNOPSIS

- 2301 Negligence Theory Transition Instruction
- 2303 Issues for Trial; Burden of Proof
- 2305 Product Negligence—Elements; Burden of Proof
- 2307 Comparative Fault—Definition
- 2309 Negligence—Definition
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- 2316(A) Defective Products—Defective Condition
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- 2317 User or Consumer—Definition
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- 2337 Defense—Modification/Alteration of Product
- 2351 Crashworthiness—Negligence Theory Transition Instruction
- 2353 Crashworthiness—Products Liability (Negligence)—Issues for Trial; Burden of Proof
- 2355 Crashworthiness—Products Liability (Negligence)—Elements; Burden of Proof

2301 Negligence Theory Transition Instruction

[*Plaintiff*][also] claims the [*defendant*] negligently [designed][manufactured][supplied][failed to warn (*plaintiff*) about] the _____, resulting in [injury][damage] to [*plaintiff*][(plaintiff)'s property][_____].

I will now instruct you on the law of negligence as it applies to this case.

2303 Issues for Trial; Burden of Proof

The Plaintiff, _____, sued _____, the Defendant

[Plaintiff] claims that [defendant][insert claimed action(s)]. [Plaintiff] must prove [his][her][its] claims by the greater weight of the evidence.

[Defendant] denies [plaintiff]'s claims. [Defendant] is not required to disprove [plaintiff]'s claims.

[Defendant] has claimed certain defenses. [Defendant] must prove [his][her][its] defense[s] of [specify affirmative defense(s)] by the greater weight of the evidence.

[(Plaintiff) also claims (he)(she)(it) is entitled to an award of punitive damages because (insert brief statement of claim for punitive damages). (Plaintiff) must prove this claim by clear and convincing evidence.]

Comments

This instruction should be modified to set forth all claims, counterclaims, and cross claims.

Jury Rule 20 and Trial Rule 51(A) require that the trial court give preliminary instructions as to the issues for trial and the burden of proof. The trial court and counsel should carefully prepare a preliminary instruction setting out the issues for trial in narrative form, including all claims, counterclaims, and cross claims. The instruction should be brief, accurate, conversational, and as non-technical as possible.

If a pretrial order has been entered, *see* T.R. 16(J), the Committee recommends that the instruction be drafted based on that order, which supplants the allegations in the pleadings, but should not be rigidly or pointlessly applied. *See Vlach v. Goode*, 515 N.E.2d 569 (Ind. Ct. App. 1987); 62 Am. Jur. 2d PreTrial Conference § 29 at 661 (1972).

Whether a pretrial order has been entered or not, the Committee recommends against reading the pleadings to the jury.

2305 Product Negligence—Elements; Burden of Proof

[*Plaintiff*] claims that [*defendant*] failed to use reasonable care in [*use only those bracketed phrases that correspond to plaintiff's claims*]:

- (1) [designing the (*product*)][and]
- (2) [warning (*plaintiff*) about the (*product*)'s danger when (*defendant*) knew, should have known, or should have discovered the danger][and]
- (3) [instructing (*plaintiff*) about the proper use of the (*product*)][and]
- (4) [selling, leasing, or otherwise putting the (*product*) into the stream of commerce when it was in a defective condition unreasonably dangerous to (users or consumers)(a user's or consumer's property)].

To recover damages from [*defendant*], [*plaintiff*] must prove each of the following by the greater weight of the evidence:

- (1) [*defendant*] failed to use reasonable care in one of the following ways, which caused the [*product*] to be in a defective condition unreasonably dangerous to [users or consumers][a user's or consumer's property]:
 - (a) [designing the (*product*)][or]
 - (b) [warning (*plaintiff*) about the (*product*)'s danger when (*defendant*) knew, should have known, or should have discovered the danger][or]
 - (c) [instructing (*plaintiff*) about the proper use of the (*product*)][or]
 - (d) [selling, leasing, or otherwise putting the (*product*) into the stream of commerce when it was in a defective condition unreasonably dangerous to (users or consumers)(a user's or consumer's property)].
- (2) [*defendant*] sold, leased, or otherwise put the [*product*] into the stream of commerce;
- (3) [*plaintiff*] was a user or consumer of the [*product*] and was in a class of persons [*defendant*] should have reasonably expected to be subject to the harm caused by the defective condition;
- (4) the [*product*] was expected to and did reach [*plaintiff*] without substantial alteration of the condition in which [*defendant*] sold the [*product*]; and
- (5) the defective condition of the [*product*] was a responsible cause of physical harm to [*plaintiff*][(plaintiff)'s property].

Comments

Although Indiana Code § 34-20-2-2 states that a manufacturer is strictly liable under Ind. Code § 34-20-2-1 (manufacturing defect cases) even though the seller has exercised all reasonable care in the manufacture and preparation of the product, the statute goes on to state that in design defect or failure to warn or instruct cases, the plaintiff must “establish that the manufacturer or seller failed to exercise

reasonable care under the circumstances in designing the product or in providing the warnings or instructions.”

Proof of safer alternative design is not required under Indiana law as an element of a negligence product liability claim. Evidence of a safer alternative, however, may be probative of the issue of the Defendant’s failure to use reasonable care under the circumstances. *Kaiser v. Johnson & Johnson*, 2018 U.S. Dist. LEXIS 19950 (N.D. Ind. Feb. 7, 2018).

2307 : Comparative Fault—Definition

You must decide this case according to the Indiana law of comparative fault. The term “fault” refers to conduct that makes a person responsible, in some degree, for [a death][an injury][property damage]. The type[s] of fault at issue [is][are][*name types of fault at issue*].

Comments

Indiana Code § 34-20-8-1 states that the jury should use the Comparative Fault Act to compare the fault of the injured person and of all others who caused or contributed to cause the harm.

Indiana Code § 34-6-2-45(a) provides, however, that a different definition of fault be used in products liability cases:

an act or omission that is negligent, willful, wanton, reckless, or intentional toward the person or property of others. The term includes the following: (1) Unreasonable failure to avoid an injury or to mitigate damages[; and] (2) A finding under IC 34-20-2 (or IC 33-1-1.5-3 before its repeal) that a person is subject to liability for physical harm caused by a product, notwithstanding the lack of negligence or willful, wanton, or reckless conduct by the manufacturer or seller.

This product liability definition of fault differs from the general comparative fault definition in that the product liability definition does not include “unreasonable assumption of risk not constituting an enforceable express consent” or “incurred risk,” but includes strict liability as a type of fault to be compared with the fault of all others who caused or contributed to cause the harm. *Compare* Ind. Code § 34-6-2-45(b) *with* Ind. Code § 34-6-2-45(a).

Indiana Code § 34-6-2-45(b) specifies that the Comparative Fault Act covers all types of fault (including intentional acts); thus instructions for cases involving both negligent and intentional acts can include the comparative fault verdict forms, which can name the intentional actors as parties or nonparties, depending on the circumstances of the case.

See *Estate of Pfafman v. Lancaster*, 67 N.E.3d 1150 (Ind. Ct. App. 2017) for a comparison of the Comparative Fault Act and the Indiana Product Liability Act.

2309 Negligence—Definition

Negligence is the failure to use reasonable care.

A person may be negligent by acting or by failing to act. A person is negligent if he or she does something a reasonably careful person would not do in the same situation, or fails to do something a reasonably careful person would do in the same situation.

Comments

Negligence consists of the failure to use reasonable care, due care, or ordinary care, which is measured by the care a person of reasonable prudence would ordinarily exercise under like conditions and circumstances. *Central Transport, Inc. v. Great Dane Trailers, Inc.*, 423 N.E.2d 675 (Ind. Ct. App. 1981); *Southern Ry. Co. v. Harpe*, 223 Ind. 124, 58 N.E.2d 346 (1944); *Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 38 N.E.2d 257 (1941); *Cleveland, C., C. & S. L. Ry. Co. v. Jones*, 51 Ind. App. 245, 99 N.E. 503 (1912).

Negligence is comprised of three elements: (1) a duty on the part of the defendant to conform his conduct to the standard of care necessitated by the relationship; (2) a breach of that duty; and (3) injury that the plaintiff suffered as a result of that failure. *Benton v. Oakland City*, 721 N.E.2d 224 (Ind. 1999); *Dibortolo v. Metropolitan School Dist.*, 440 N.E.2d 506 (Ind. Ct. App. 1982).

When found to exist, the duty to exercise reasonable care under the circumstances never changes; however, the standard of conduct required to measure up to that duty varies depending upon the particular circumstances. *Franklin v. Benock*, 722 N.E.2d 874 (Ind. Ct. App. 2000).

Clyde E. Williams & Assoc. v. Boatman, 375 N.E.2d 1138, 1141 (Ind. Ct. App. 1978), discusses the issue of duty in the context of jury instructions:

While it is clear that the trial court must determine if an existing relationship gives rise to a duty, it must also be noted that a factual question may be interwoven with the determination of the existence of a relationship, thus making the ultimate existence of a duty a mixed question of law and fact. This dichotomy presents a trial court with a difficult problem in the drafting of instructions.

In *Clyde E. Williams & Assoc.*, the jury was instructed to consider whether the defendant had a duty, but was not given any direction about how to make that determination. The Court of Appeals stated that "it would be proper to instruct the jury alternatively that if it should find a certain set of facts, then a duty exists; however, should the jury reach a different factual conclusion, then no duty would exist." *Clyde E. Williams & Assoc.*, 375 N.E.2d at 1141. This duty question may arise, for example, in the context of premises liability where certain duties apply based on the status of the person on the property. *Clyde E. Williams & Assoc.*, 375 N.E.2d at 1141.

2311 Reasonable Care—Definition

Reasonable care means being careful and using good judgment and common sense.

Comments

Negligence consists of the failure to use reasonable care, due care, or ordinary care, which is measured by the care a person of reasonable prudence would ordinarily exercise under like conditions and circumstances. *Central Transport, Inc. v. Great Dane Trailers, Inc.*, 423 N.E.2d 675 (Ind. Ct. App. 1981); *Southern Ry. v. Harpe*, 223 Ind. 124, 58 N.E.2d 346 (1944); *Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 38 N.E.2d 257 (1941); *Cleveland, C., C. & St. L. Ry. v. Jones*, 51 Ind. App. 245, 99 N.E. 503 (1912).

When found to exist, the duty to exercise reasonable care under the circumstances never changes; however, the standard of conduct required to measure up to that duty varies depending upon the particular circumstances. *Franklin v. Benock*, 722 N.E.2d 874 (Ind. Ct. App. 2000), *reh'g denied, trans. denied*.

In Indiana there are no degrees of care. The use of such terms as slight care, great care, highest degree of care, or other like expressions in instructions as indicating the quantum of care the law exacts under special conditions and circumstances is misleading. *Thompson v. Ashba*, 122 Ind. App. 58, 102 N.E.2d 519 (1951); *Midwest Motor Coach Co. v. Elliott*, 95 Ind. App. 64, 182 N.E. 541 (1932).

A person with a mental disability is generally held to the same standard of care as that of a reasonable person under the same circumstances without regard to the person's capacity to control or understand the consequences of his or her actions. See Restatement 2d Torts § 283B (1965); *Creasy v. Rusk*, 730 N.E.2d 659, 667 (Ind. 2000). In *Creasy*, the Supreme Court balanced three factors to determine whether an individual owes a duty to another (the relationship between the parties, whether the harm to the person injured was reasonably foreseeable, and public policy concerns) and held that an Alzheimer patient owed no duty of care to a nursing home assistant who was injured when the patient kicked her.

For the standard of care of children, see Instruction No. 1129 on contributory negligence of children and Instruction No. 927 on comparative fault of children.

2313 Responsible Cause (Proximate Cause)—Definition

A person's conduct is legally responsible for causing [an injury][property damage][a death] if:

- (1) the [injury][property damage][a death] would not have occurred without the conduct, and
- (2) the [injury][property damage][a death] was a natural, probable, and foreseeable result of the conduct.

This is called a "responsible cause."

[There can be more than one responsible cause for an injury.]

Comments

Scholars identify the use of legal jargon and arcane legalese as the most serious flaws of contemporary jury instructions. John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1209 (2002). In fact, in one study of 14 jury instructions, the proximate cause instruction produced proportionally the most misunderstanding among laypersons. The study revealed that jurors mistake "proximate cause" for "approximate cause," "estimated cause," or some fabrication. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979); see also Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L.J. 456, 468 (1962) ("proximate cause" is frequently misinterpreted to mean "probable" or "approximate cause"); James D. Wascher, *The Importance of Juries: The Long March Toward Plain English Jury Instructions*, 19 Chicago Bar Ass'n Record 50, 50–51 (2005) (a Chicago judge reported that he presided over a trial in which the jury sent him a note asking whether proximate cause meant "it's pretty close to the cause").

Prosser and Keeton say that proximate cause is "is an unfortunate word, which places entirely the wrong emphasis on the factor of physical or mechanical closeness." Prosser & Keeton, *The Law of Torts* § 42. They even imply that it was a sin to have coined the term "proximate cause" in the first place. Prosser & Keeton, *The Law of Torts* § 42. ("The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins.") The Committee has determined that use of a term so likely to be misunderstood is against the policy behind clear jury instructions.

There are two types of causation in a negligence case—causation in fact and proximate cause. See, e.g., Prosser & Keeton, *The Law of Torts* §§ 41 (causation in fact), 42 (proximate cause) (5th ed. 1984). Causation in fact is the threshold question of whether "but for" the defendant's negligent conduct, plaintiff's harm would not have occurred. Or, to put it another way, plaintiff's harm would not have occurred without the defendant's negligent conduct. *Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981) (citing W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971); 21 I.L.E. Negligence § 62 (1959)). Because the consequences of an act go forward to eternity and back before the dawn of human events, there must also be "some reasonable connection between the act or omission

of the defendant and the damage which the plaintiff has suffered.” Prosser & Keeton, *The Law of Torts* § 41. This is proximate cause, and it boils down to “whether the conduct has been so significant and important a cause that the defendant should be legally responsible.” Prosser & Keeton, *The Law of Torts* § 41. Prosser and Keeton therefore suggest that either “responsible cause” or “legal cause” would be a more appropriate term. Prosser & Keeton, *The Law of Torts* § 41. Because use of the term “legal cause” might suggest to the jury that there could also be an “illegal cause,” the Committee selected “responsible cause.”

The Indiana Supreme Court has held that a proximate cause instruction is not *required* to refer to “but for” causation, “so long as the instructions as a whole adequately convey the law in this area.” *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 301 (Ind. 2009). To ensure that the instructions as a whole *do* adequately convey both proximate cause and causation in fact, the Committee has included both concepts in this one instruction. Subpart (1) of the instruction (“the injury would not have occurred without the conduct”) instructs on causation in fact. And because the Indiana Supreme Court has explained proximate cause as the natural and probable consequence of the conduct, subpart (2) of the instruction (“the injury was a natural and probable result of the conduct”) instructs on proximate cause. “A negligent act is said to be the proximate cause of an injury ‘if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.’ ” *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003) (quoting *Bader v. Johnson* 732 N.E.2d 1212, 1218 (Ind. 2000)).

Plaintiff in a negligence action has the burden of proving causation in fact by a preponderance of the evidence. *Turner v. Davis*, 699 N.E.2d 1217 (Ind. Ct. App. 1998) (causation in fact); *Carter v. Aetna Life Ins. Co.*, 217 Ind. 282, 27 N.E.2d 75 (1940) (proximate cause). What is the proximate cause of the injury is ordinarily a question of fact for the jury that becomes a question of law when only a single conclusion can be drawn from the facts. *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101 (Ind. Ct. App. 1999).

The court is not required to repeat the substance of an instruction defining proximate cause, and outlining the necessity of establishing it, in every general instruction relating to the subject of negligence. *Swallow Coach Lines, Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938).

The “conduct” discussed in this Instruction includes acts and omissions. *See, e.g.*, Instruction Nos. 909 and 1107.

There can be more than one responsible cause for an injury. *See, e.g.*, *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006) (“An injury may have more than one proximate cause.”); *Board of Comm’rs v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992) (“There may be more than one proximate cause of an event.”); *Krohn v. Shidler*, 140 Ind. App. 175, 185 (1966) (“It is not necessary that such negligence be the sole proximate cause.”). The bracketed sentence about multiple responsible causes should be given when it is an issue in the case.

2314 Foreseeable—Defined

[An injury][Property damage][A death] is “foreseeable” when a person should realize that [his][her] act or failure to act might cause harm.

Comments

In the context of proximate/responsible cause, the question is whether the injury “is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.” *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 108 (Ind. 2002) (citing *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000)). “The determination of what is reasonably foreseeable is not judged by the subjective opinions of those involved, but is based upon the standard of due care in avoiding a result which might reasonably have been anticipated in the ordinary experience of people.” *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 917–18 (Ind. Ct. App. 2001) (citing *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101, 1105 (Ind. Ct. App. 1999)). When some harm is foreseeable, a person is responsible for any injury even if the extent of the injury was unforeseeable. *Bolin v. Wingert*, 764 N.E.2d 201, 207–08 (Ind. 2002). “If the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor’s negligence.” *Hampton v. Moistner*, 654 N.E.2d 1191, 1194 (Ind. Ct. App. 1995).

2315 Product—Definition

A “product” is a physical object that is personal property at the time it is [sold][transferred] by the seller to another person or entity.

The term “product” does not apply where a transaction mainly involves the sale of a service.

Comments

Indiana Code § 34-6-2-114(a) defines “product” as “any item or good that is personalty at the time it is conveyed by the seller to another party.”

The Product Liability Act does not apply to transactions that are predominately for the sale of a service. Ind. Code § 34-6-2-114(b); *Lenhardt Tool & Die Co. v. Lumpe*, 703 N.E.2d 1079, 1085 (Ind. Ct. App. 1998). It can be difficult to distinguish between a product and a service. See William C. Powers, Jr., *Distinguishing Between Products and Services in Strict Liability*, 62 N.C.L. Rev. 415 (1984). The issue is fact-specific. See, e.g., *Hill v. Rieth-Riley Constr. Co.*, 670 N.E.2d 940 (Ind. Ct. App. 1996), *overruled on other grounds by Peters v. Forster*, 804 N.E.2d 736, 740 (Ind. 2004) (because defendant’s installation of guardrails was part of a larger contract to resurface highway, the transaction was predominately for the sale of services); *Marsh v. Dixon*, 707 N.E.2d 998 (Ind. Ct. App. 1999) (purchase of a ticket to ride in a wind tunnel machine was the purchase of a service); *Sapp v. Morton Bldgs. Inc.*, 973 F.2d 539 (7th Cir. 1992) (because interior structures were custom fit, rather than prefabricated, contractor’s remodeling of barn was predominately for the sale of services); *Whitaker v. T.J. Snow Co.*, 151 F.3d 661 (7th Cir. 1998) (because defendant only refurbished machine, did not manufacture any significant component parts, and mainly installed the components according to plaintiff’s specifications, and because the contract specified that defendant was not to rebuild the machine, that contract was predominately for the sale of services).

The “pre-dominate thrust test” used to determine whether a transaction is a sale of goods governed by Uniform Commercial Code can also be useful in determining whether a transaction is predominantly for products or services within the scope of the Product Liability Act. *Dow Chemical Co. v. Ebling*, 723 N.E.2d 881 (Ind. Ct. App. 2000), *adopted in relevant part but vacated as to preemption by* 753 N.E.2d 633 (Ind. 2001). In applying this test, a court should consider these factors: (1) the terms describing the performance required of the parties and the words used to describe the relationship between the parties; (2) the circumstances of the parties and the primary reason they entered into the contract; (3) the final product the purchaser bargained to receive, and whether it may be described as a good or a service; and (4) the costs involved for the goods and services, and whether the purchaser was charged for a good, or a price based on both goods and services. *Dow Chemical Co.*, 723 N.E.2d at 904–05.

2316(A) Defective Products—Defective Condition

A product is in a defective condition if, when it is [transferred][sold] by the seller to another [person][entity], its condition:

- (1) would not be anticipated by a reasonable, expected user or consumer, and
- (2) is unreasonably dangerous to that user or consumer when [he][she] uses the product in a reasonably expected way.

Comments

Indiana Code § 34-20-4-1 states that a product is in a defective condition if, at the time it is conveyed by the seller to another party, it is in a condition:

- (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and
- (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.

2316(B) Defective Product—Warnings/Instructions

A product is defective if the seller fails to:

- (1) properly package or label the product with reasonable warnings about the dangers of the product; or
- (2) give reasonably complete instructions about the proper use of the product;

when the seller, by exercising reasonable diligence, could have made those warnings or instructions available to the user or consumer.

Comments

Indiana Code § 34-20-4-2 states that a product is defective if the seller fails to: (1) properly package or label the product to give reasonable warnings of danger about the product, or (2) give reasonably complete instructions on proper use of the product, if the seller could have made those warnings or instructions available to the user or consumer by using reasonable diligence.

Argument by a designer of support stands that a product did not have to be designed safer if adequate warnings were provided was inconsistent with the standard of care for product design, as the Indiana Product Liability Act did not include a defense or presumption that adequate warnings rendered a product not defective and not unreasonably dangerous. *Weigle v. Spx Corp.*, 729 F.3d 724 (7th Cir. Ind. 2013).

2317 User or Consumer—Definition

“User or consumer” means:

- (1) a purchaser;
- (2) a person who used or consumed a product;
- (3) a person who possessed or controlled a product, while acting for the person injured by the product; or
- (4) a bystander who was injured by a product, and who would reasonably be expected to be near the product during its reasonably expected use.

Comments

Ind. Code § 34-6-2-29 defines “consumer” for purposes of the Product Liability Act as: “(1) a purchaser; (2) any individual who uses or consumes the product; (3) any other person who, while acting for or on behalf of the injured party, was in possession and control of the product in question; or (4) any bystander injured by the product who would reasonably be expected to be in the vicinity of the product during its reasonably expected use.”

“User” has the same definition as “consumer” under the Act. Ind. Code § 34-6-2-147.

2319 Physical Harm—Definition

“Physical harm” means:

- (1) bodily injury;
- (2) death;
- (3) loss of services and rights resulting from bodily injury or death; and
- (4) sudden, major damage to property other than damage to the product itself.

“Physical harm” does not include gradual damage to property, or the economic losses which arise from the gradual damage.

Comments

Indiana Code § 34-6-2-105(a) defines physical harm as “bodily injury, death, loss of services, and rights arising from any such injuries, as well as sudden, major damage to property.” Subsection (b) states, “The term does not include gradually evolving damage to property or economic losses from such damage.”

“Sudden, major damage” is damage that happens quickly and unexpectedly, and is significant in scope. *Reed v. Central Soya Co.*, 621 N.E.2d 1069, 1076 (Ind. 1993) (damages from contaminated feed occurred gradually and was not “sudden, major damage”); *see also Martin Rispens & Son v. Hall Farms*, 621 N.E.2d 1078 (Ind. 1993) (damages to watermelon from blighted watermelon seeds evolved gradually over a period of months was not “sudden major damage”); *Interstate Cold Storage, Inc. v. General Motors Corp.*, 720 N.E.2d 727 (Ind. Ct. App. 1999) (when truck driver heard a strange sound, saw smoke coming from the truck, pulled over, then saw flames near the engine, the damage was sudden and major).

Strict liability in tort is inapplicable to claims of damage to product itself. *Reed*, 621 N.E.2d at 1074; *Martin Rispens & Son*, 621 N.E.2d 1078. The Products Liability Act bars a tort action where no damage to person or other property is present. *Progressive Ins. Co. v. General Motors*, 749 N.E.2d 484 (Ind. 2001) (fires allegedly caused by vehicle defects that damaged the vehicles but not any person or property did not cause “physical harm” within the meaning of the act); *see also Interstate Cold Storage, Inc.*, 720 N.E.2d 727.

The Act provides a manufacturer of a *product* is liable for physical harm caused by that *product* to the user’s property. *See* Ind. Code § 34-20-2-1. Although it is possible in general terms for the product to also be the property of the user, the Act does not use the terms “product” and “property” interchangeably. The language of the Act contemplates the defective product acting on some other property causing some harm to it. *Interstate Cold Storage, Inc.*, 720 N.E.2d 727; *I/N Tek v. Hitachi, Ltd.*, 734 N.E.2d 584 (Ind. Ct. App. 2000) (damage to the product itself was insufficient to support recovery under the Product Liability Act, even if the damage was sudden and major); *Hitachi Constr. Mach. Co. v. Amax Coal Co.*, 737 N.E.2d 460 (Ind. Ct. App. 2000) (“other property” is that which is wholly outside and apart from the product itself).

2321 Seller—Definition

A “seller” is a person who sells or leases products to others for resale, use, or consumption.

Comments

Indiana Code § 34-6-2-136 defines “seller” as “a person engaged in the business of selling or leasing a product for resale, use, or consumption.”

Prod. Liability:
Negligence

2323 Manufacturer—Definition

A “manufacturer” is a [person][entity][who][that] designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the product or part is sold to a user or consumer.

Comments

Indiana Code § 34-6-2-77 defines “manufacturer” as “a person or an entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer.”

2325 Unreasonably Dangerous—Definition

A product is “unreasonably dangerous” if its use exposes a user or consumer to a risk of physical harm beyond that contemplated by an ordinary consumer who purchases the product with ordinary knowledge about the product’s characteristics.

Comments

Indiana Code § 34-6-2-146 states that “unreasonably dangerous” “refers to any situation in which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer who purchases the product with the ordinary knowledge about the product’s characteristics common to the community of consumers.”

Under the Product Liability Act, the requirement that a product be in a defective condition focuses on the product itself while the requirement that the product be “unreasonably dangerous” focuses on the reasonable contemplations and expectations of consumer. *Welch v. Scripto-Tokai Corp.*, 651 N.E.2d 810, 814 (Ind. Ct. App. 1995). Both must exist—the product must be in a defective condition and be unreasonably dangerous—for liability to attach in a product liability case. *Welch*, 651 N.E.2d at 814 (disposable butane cigarette lighter did not function in manner not expected by an ordinary consumer (an adult) and was not “unreasonably dangerous,” even though a lighter can be potentially dangerous in hands of child); *see also Natural Gas Odorizing v. Downs*, 685 N.E.2d 155 (Ind. Ct. App. 1997) (failure to provide adequate warning about the odor fade of odorant mixed with natural gas made the product both defective and unreasonably dangerous); *Rupert v. Machine Tool Corp.*, 661 N.E.2d 826 (Ind. Ct. App. 1995) (while chuck that got stuck might have been defective, and risk of injury when trying to open it might have been dangerous, that risk is normal and within a consumer’s ordinary knowledge about product’s characteristics); *Smith v. Amli Realty Co.*, 614 N.E.2d 618 (Ind. Ct. App. 1993) (although weight machine was potentially dangerous to children, it was not unreasonably dangerous, because it functioned properly as exercise equipment).

2327 Seller as “Manufacturer”—Definition

A “seller” of products is held to the same standard as a “manufacturer,” if any of the following apply:

- (1) the seller has actual knowledge of a defect in the product;
- (2) the seller creates and gives a manufacturer specifications for producing the products that are relevant to the alleged defect;
- (3) the seller exercises significant control over all or a portion of the manufacturing process;
- (4) the seller alters or modifies the product in a significant manner after the product comes into the seller’s possession and before it is sold to the ultimate user or consumer;
- (5) the seller is owned in whole or significant part by the manufacturer; or
- (6) the seller owns the manufacturer, in whole or in significant part.

[A seller who discloses the name of the actual manufacturer of a product is not a “manufacturer” merely because the seller places or has placed a private label on a product.]

Comments

Indiana Code § 34-6-2-77(a) states, that a manufacturer includes a seller who:

- (1) has actual knowledge of a defect in a product;
- (2) creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process;
- (3) alters or modifies the product in any significant manner after the product comes into the seller’s possession and before it is sold to the ultimate user or consumer;
- (4) is owned in whole or significant part by the manufacturer; or
- (5) owns in whole or significant part the manufacturer.

Subsection (b) further states, “A seller who discloses the name of the actual manufacturer of a product is not a manufacturer under this section merely because the seller places or has placed a private label on a product.”

If this instruction is given, the court should also consider the applicability Instruction No. 2323.

The court should include the last paragraph of the instruction (the language in brackets) in a products negligence case if the seller is treated as the manufacturer.

2329 Products in Conformity with State of the Art or in Compliance with Applicable Codes—Not Defective (Rebuttable Presumption)

[Defendant] claims the [product] was not defective because the [product][was manufactured in conformity with the state of the art][complied with applicable codes].

You may assume that the [product] was not defective and [defendant] was not negligent if you decide that [defendant] has proved by the greater weight of the evidence that, before [defendant] sold the product:

- (1) [it conformed to the generally recognized state of the art applicable to the safety of the product at the time the product was designed, manufactured, packaged, and labeled.][or]
- (2) [it complied with applicable codes, standards, regulations, or specifications established, adopted, promulgated, or approved by the United States or by Indiana, or by an agency of the United States or Indiana.]

[Plaintiff] may overcome this assumption by introducing evidence tending to show that despite [compliance][or][conformity], the [product] was in a defective condition unreasonably dangerous to any user or consumer. If [plaintiff] introduces this evidence, then you may, but are not required to, decide that [plaintiff] has overcome the assumption that the [product] was not defective and [defendant] was not negligent.

Comments

The rebuttal presumption is found at Ind. Code 34-20-5-1.

Indiana Evidence Rule 301 states:

In all civil actions and proceedings not otherwise provided for by constitution, statute, judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. A presumption shall have continuing effect even though contrary evidence is received.

(Emphasis added.)

In *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 985 (Ind. 2006), the Supreme Court determined that a presumption is properly given continuing effect, for purposes of Rule 301, when the trial court instructs the jury that when a basic fact is proven, the jury may infer the existence of a presumed fact: “We hold that a presumption is properly given ‘continuing effect’ under the last sentence of Indiana Evidence Rule 301 by the trial court instructing the jury that when a basic fact is proven, the jury may infer the existence of a presumed fact.” 857 N.E.2d at 985.

The instruction approved in *Schultz* stated:

Ford Motor Company has alleged that the Plaintiffs’ 1995 Ford Explorer complied with the Federal Motor Vehicle Safety Standard 216. Ford Motor Company has the burden of proving this allegation.

If you find Ford Motor Company has proved by a preponderance of the evidence that before the 1995 Ford Explorer was sold by Ford Motor Company that it complied with Federal Motor Vehicle Standard 216 then you may presume that Ford Motor Company was not negligent in its design of the 1995 Ford Explorer and that the 1995 Ford Explorer was not defective.

However, the Plaintiffs may rebut this presumption if they introduced evidence tending to show that the 1995 Ford Explorer was defective.

The model instruction changes the word “presume” to “assume” as suggested in *Schultz*, and took direction from *Accord Flis v. Kia Motors Corp.*, No. 1:03CV1567-JDT-TAB, 2005 U.S. Dist. LEXIS 12911 (S.D. Ind. June 20, 2005) (not for publication), to which the *Schultz* court referred.

The rebuttable presumption should not be given as an instruction in all instances. In *Wade v. Terex-Telelect, Inc.*, 966 N.E.2d 186, 194 (Ind. Ct. App. 2012), the Court of Appeals held that for state of the art evidence and evidence of compliance with governmental standards to be relevant, “the standard itself must relate to the risk or product defect at issue.” *Wade*, 966 N.E.2d at 195. The trial court’s jury instruction was erroneous because it was unsupported by relevant evidence and went to the very heart of the case, allowing the jury to presume that the product was not defective and that the defendant was not negligent if the product was manufactured in conformity with state of the art or compliance with government regulations. *Wade*, 966 N.E.2d at 195.

For further discussion on rebuttable presumption, see *Miller v. Bernard*, 957 N.E.2d 685 (Ind. Ct. App. 2011). In this case, the Court of Appeals reversed the trial court and allowed expert testimony on rebuttal presumption to go to the jury.

2331 Defense—No Duty to Warn for Open and Obvious Dangers

If you decide that any danger to [plaintiff] was open and obvious, [plaintiff] cannot recover under [his][her] claim that [defendant] failed to warn of that danger.

Comments

The “open and obvious” doctrine is applicable in product liability cases based on negligence but not based on strict liability. *Miller v. Todd*, 551 N.E.2d 1139 (Ind. 1990); *Koske v. Townsend Eng’g Co.*, 551 N.E.2d 437 (Ind. 1990). In the strict liability context, the obviousness of a danger is relevant, however, in determining whether a product was sold in an unreasonably dangerous and defective condition, and in evaluating the affirmative defense of incurred risk. *Koske*, 551 N.E.2d at 440–41. The open and obvious doctrine does not apply to non-product liability negligence cases. *Bridgewater v. Economy Eng’g Co.*, 486 N.E.2d 484 (Ind. 1985).

The doctrine provides that, although a manufacturer who has actual or constructive knowledge of an unobservable defect or danger is subject to liability for failing to warn of the danger, there is no duty to warn if the danger is open and obvious to all. See *J. I. Case Co. v. Sandefur*, 245 Ind. 213, 197 N.E.2d 519 (1964); *Burton v. L. O. Smith Foundry Prods. Co.*, 529 F.2d 108 (7th Cir. 1976); *Posey v. Clark Equip. Co.*, 409 F.2d 560 (7th Cir. 1969); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965).

Whether a danger is open and obvious is the same question of whether the danger is concealed or hidden to the user in a given set of facts and is therefore properly submitted to the jury when the facts are in dispute, and can be a question of fact. *Bridgewater*, 486 N.E.2d at 488.

The open and obvious danger rule is not an affirmative defense. *FMC Corp. v. Brown*, 526 N.E.2d 719, 729 (Ind. Ct. App. 1988), *adopted in part by* 551 N.E.2d 444 (Ind. 1990). The plaintiff has the burden of pleading and proving latency or, in other words, negating patency. *FMC Corp.*, 526 N.E.2d at 729.

The open and obvious danger rule does not preclude a plaintiff’s claim that the manufacturer engaged in willful or wanton misconduct; the obviousness of the danger is but one factor to consider. *Koske*, 526 N.E.2d 990–92, *adopted by* 551 N.E.2d 437, 444 (Ind. 1990).

2333 Defense—Misuse of Product

[Defendant] claims that misuse of the [product] caused [plaintiff]’s damages.

To assign fault against [plaintiff][named non-party] for misuse, [defendant] must prove the following by the greater weight of the evidence:

- (1) [plaintiff][named non-party] used the [product] in a manner that was not reasonably expected by [defendant] at the time the [product] was sold; and
- (2) this misuse of the [product] was a responsible cause of the [harm][damage-][plaintiff] suffered.

Comments

Indiana Code § 34-20-6-4 states that a plaintiff or other person’s misuse of the product is a defense if that misuse was not reasonably expected by the seller at the time the seller sold or otherwise conveyed the product.

Courts have further defined misuse as use for a purpose or in a manner not foreseeable by the manufacturer. *Barnard v. Saturn Corp.*, 790 N.E.2d 1023, 1030 (Ind. Ct. App. 2003).

A consumer who uses a product in contravention of a legally sufficient warning, misuses the product, and in the context of the defense of incurred or assumed risk, is subject to the defense of misuse. *Barnard*, 790 N.E.2d at 1030.

In *Morgen v. Ford Motor Co.*, 797 N.E.2d 1146 (Ind. 2003), the Indiana Supreme Court expressly declined to decide whether misuse is a complete defense to a product liability claim. The committee therefore relied on the latest appellate case of *Barnard*, 790 N.E.2d 1023, which applies the Comparative Fault Act to product liability claims, even those based on strict liability. A plaintiff’s misuse of a product therefore falls within the statutory definition of “fault” as an act or omission that is intentional toward the property of others, including an unreasonable failure to avoid an injury or to mitigate damages. Ind. Code §§ 34-6-2-45(a), 34-20-8-1.

2335 Defense—Known Defect and Danger

[Defendant] claims [plaintiff] knew of the defect and danger of the [product].

[Plaintiff] cannot recover if [defendant] proves each of the following by the greater weight of the evidence:

- (1) [plaintiff] knew of the [product]'s defect;
- (2) [plaintiff] was aware of the danger in the [product]; and
- (3) [plaintiff] nevertheless used [product] and was injured.

Comments

Indiana Code § 34-20-6-3 provides that it is a defense that the plaintiff-user/consumer:

- (1) knew of the defect;
- (2) was aware of the danger in the product; and
- (3) nevertheless proceeded to make use of the product and was injured.

In dicta, *Vaughn v. Daniels Co.*, 841 N.E.2d 1133, 1146 (Ind. 2006), states that incurred risk is a complete bar to negligence claims under the Products Liability Act. The sharply divided Committee decided to draft the instruction based on that dicta to make incurred risk a complete defense. The Committee acknowledges, however, that a compelling argument can be made that comparative fault should apply to the application of the defense of incurred risk. See, e.g., Ind. Code § 34-20-8-1 (assessment of percentage of fault); *Smith v. Baxter*, 796 N.E.2d 242 (Ind. 2003) (incurred risk triggers comparative fault in premises liability cases). It also remains unclear whether the Indiana Supreme Court intended incurred risk to act as a complete bar to strict liability for a manufacturing defect under the Products Liability Act.

The Committee also acknowledges that many cases discuss the open and obvious rule, which is a lesser standard than incurred risk as defined by the Products Liability Act in Ind. Code § 34-20-6-3. The Committee questions whether the open and obvious rule is even applicable to products liability cases, or whether it is merely a vehicle used to prove incurred risk or whether a product was unreasonably dangerous in the first instance.

2337 Defense—Modification/Alteration of Product

[Defendant] claims that modification or alteration of the [product] caused [plaintiff]'s damages.

To assign fault against [plaintiff][named non-party] for modification or alteration, [defendant] must prove the following by the greater weight of the evidence:

- (1) any person modified or altered the [product] after it was delivered to the initial user or consumer;
- (2) the modification or alteration was not reasonably expected by [defendant] at the time the [product] was sold; and
- (3) the modification or alteration of the [product] was a responsible cause of the [harm][damage][plaintiff] suffered.

Comments

Indiana Code § 34-20-6-5 provides that modification or alteration of the product after the product's delivery to the initial user or consumer is a defense "if the modification or alteration is the proximate cause of physical harm where the modification or alteration is not reasonably expectable to the seller."

Indiana Code § 34-20-6-5, uses the phrase "is the proximate cause." The model instruction uses "a responsible cause," because there can be more than one proximate cause, and because the committee changed the term proximate cause to responsible cause.

2351 Crashworthiness—Negligence Theory Transition Instruction

[Plaintiff] also claims that [Defendant] negligently designed the [name the product or component claimed to be negligently designed] resulting in enhanced physical harm to [plaintiff][(plaintiff)'s property].

I will now instruct you on the law of negligence as it applies to this case.

Comments

This instruction should only be given if the plaintiff has also filed a claim based on strict liability under the Indiana Products Liability Act.

2353 Crashworthiness—Products Liability (Negligence)—Issues for Trial; Burden of Proof

[**(*Plaintiff*) claims that (he)(she)(it) was involved in (*briefly describe the event as alleged by plaintiff*) on (insert date).**]

[*Plaintiff*][also] claims that [*defendant*] negligently designed the [*name the product or component claimed to be negligently designed*]. [*Plaintiff*] further claims that although the negligent design of the [*name the product or component claimed to be negligently designed*] did not cause the [collision][incident] in which [*plaintiff*] was involved, the physical harm to [*plaintiff*][(*plaintiff*)'s property] was greater than the physical harm would have been had the [*name the product or component claimed to be negligently designed*] not been negligently designed. [*Plaintiff*] must prove [his][her][its] claims by the greater weight of the evidence.

[*Defendant*] denies [*plaintiff*]'s claims. [*Defendant*] is not required to disprove [*plaintiff*]'s claims.

[*Defendant*] has claimed certain defenses. [*Defendant*] must prove [his][her][its] defense[s] of [*specify affirmative defense(s)*] by the greater weight of the evidence.

[(*Plaintiff*) also claims (he) (she) (it) is entitled to an award of punitive damages because (*insert brief statement of claim for punitive damages*). (*Plaintiff*) must prove this claim by clear and convincing evidence.]

Comments

Use language bracketed by “**” only if the jury has not been previously instructed regarding the collision in which plaintiff claims to have been involved.

Under the doctrine of crashworthiness a motor vehicle manufacturer may be liable in negligence or strict liability for injuries sustained in a motor vehicle accident where a manufacturing or design defect, though not the cause of the accident, caused or enhanced the injuries. *Comacho v. Honda Motor Co.*, 741 P.2d 1240, (Colo. 1987), *cert. dismissed*, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988). The enhanced injury doctrine has been applied to automobiles, motorcycles, airplanes, snowmobiles, front-end loaders, pleasure boats and riding lawnmowers and tractors. *Tafoya v. Sears Roebuck and Co.*, 884 F.2d 1330 (10th Cir. 1989). The Indiana Supreme Court has recognized the crashworthiness theory as a viable cause of action. *Miller v. Todd*, 551 N.E.2d (Ind. 1990).

In a crashworthiness case alleging enhanced injuries under the Indiana Products Liability Act, the finder of fact shall apportion fault to the person suffering physical harm when that alleged fault is a (proximate) responsible cause of the harm for which damages are being sought. *Green v. Ford Motor Co.*, 942 N.E.2d 791 (Ind. 2011).

Often, a negligence claim under the Products Liability Act includes not only a design defect but also claims for failure to warn and failure to instruct. The proposed instruction does not include claims for negligent failure to warn or failure to instruct. *Miller v. Todd*, 551 N.E.2d 1139 (Ind. 1990), only discusses liability for a manufacturing defect (strict liability) and negligent design under a crashworthi-

ness theory of recovery, but does not specifically exclude claims for negligent failure to warn and failure to instruct which were not at issue in that case.

2355 Crashworthiness—Products Liability (Negligence)—Elements; Burden of Proof

[Plaintiff] claims that [defendant] failed to use reasonable care in designing the [product].

[Plaintiff] further claims that although the [defendant] did not cause the [collision][incident] in which [plaintiff] was involved, [defendant]'s failure to use reasonable care in designing the [product] was a responsible cause of the enhanced physical harm to [plaintiff] in the [collision][incident].

To recover damages from [defendant], [plaintiff] must prove each of the following by the greater weight of the evidence:

- (1) [defendant] failed to use reasonable care in designing the [product], which caused the [product] to be in a defective condition unreasonably dangerous to [users or consumers][a user's or consumer's property];
- (2) [defendant] sold, leased, or otherwise put the [product] into the stream of commerce;
- (3) [plaintiff] was a user or consumer of the [product] and was in a class of persons [defendant] should have reasonably expected to be subject to the harm caused by the defective condition;
- (4) the [product] was expected to and did reach [plaintiff] without substantial alteration of the condition in which [defendant] sold the [product];
- (5) the physical harm to [plaintiff][(plaintiff)'s property] was greater than the physical harm would have been had the [product] had not been in a defective condition; and
- (6) the defective condition of the [product] was a responsible cause of the enhanced physical harm to [plaintiff][(plaintiff)'s property].

Comments

In a crashworthiness case alleging enhanced injuries under the Indiana Products Liability Act, the finder of fact shall apportion fault to the person suffering physical harm when that alleged fault is a (proximate) responsible cause of the harm for which damages are being sought. *Green v. Ford Motor Co.*, 942 N.E.2d 791 (Ind. 2011).

Indiana Code § 34-20-8-1 states that the jury should use the Comparative Fault Act to compare the fault of the injured person and of all others who caused or contributed to cause the harm. Indiana Code § 34-6-2-45(b) further specifies that the Comparative Fault Act covers all types of fault (including intentional acts). Thus, instructions for cases involving both negligent and intentional acts can include the comparative fault verdict forms, which can name the intentional actors as parties or nonparties, depending on the circumstances of the case.

Instruction Nos. 941 and 943 cover comparative fault apportionment.

CHAPTER 2500

PRODUCT LIABILITY: WARRANTY

SYNOPSIS

- 2501 Issues for Trial; Burden of Proof
- 2503 Breach of Warranty—Elements
- 2505 Responsible Cause (Proximate Cause)—Definition
- 2506 Foreseeable—Defined
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- 2509 Express Warranties by Statement, Promise, Description or Sample
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- 2517 Implied Warranties Arising from Course of Dealing or Use of Trade
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- 2523 Cumulation and Conflict of Warranties Express or Implied
- 2525 Third Party Beneficiaries of Warranties
- 2527 Measure of Damages—Warranty Cases

2501 Issues for Trial; Burden of Proof

The Plaintiff, _____, sued _____, the Defendant

[Plaintiff] claims that [defendant][insert claimed action(s)]. [Plaintiff] must prove [his][her][its] claims by the greater weight of the evidence.

[Defendant] denies [plaintiff]'s claims. [Defendant] is not required to disprove [plaintiff]'s claims.

[Defendant] has claimed certain defenses. [Defendant] must prove [his][her][its] defense[s] of [specify affirmative defense(s)] by the greater weight of the evidence.

[(Plaintiff) also claims (he)(she)(it) is entitled to an award of punitive damages because (insert brief statement of claim for punitive damages). (Plaintiff) must prove this claim by clear and convincing evidence.]

Comments

This instruction should be modified to set forth all claims, counterclaims, and cross claims.

Jury Rule 20 and Trial Rule 51(A) require that the trial court give preliminary instructions as to the issues for trial and the burden of proof. The trial court and counsel should carefully prepare a preliminary instruction setting out the issues for trial in narrative form, including all claims, counterclaims, and cross claims. The instruction should be brief, accurate, conversational, and as non-technical as possible.

If a pretrial order has been entered, *see* T.R. 16(J), the Committee recommends that the instruction be drafted based on that order, which supplants the allegations in the pleadings, but should not be rigidly or pointlessly applied. *See Vlach v. Goode*, 515 N.E.2d 569, 570 (Ind. Ct. App. 1987); 62 Am. Jur. 2d PreTrial Conference § 29 at 661 (1972).

Whether a pretrial order has been entered or not, the Committee recommends against reading the pleadings to the jury.

2503 Breach of Warranty—Elements

To recover damages from [defendant], [plaintiff] must prove all of the following by the greater weight of the evidence:

- (1) a warranty existed;
- (2) [defendant] breached the warranty; and
- (3) the breach of warranty was a responsible cause of [plaintiff]'s loss.

Comments

The statutory definitions of the term “physical harm” and “seller” for purposes of product liability can be found at Ind. Code § 34-6-2-105 and Ind. Code § 34-6-2-136, respectively. *See also* Instruction Nos. 2111 and 2113.

Actions brought under the Products Liability Act and the Uniform Commercial Code (UCC) represent two different causes of action providing alternative remedies. *Hitachi Constr. Mach. Co. v. Amax Coal Co.*, 737 N.E.2d 460, 465 (Ind. Ct. App. 2000) *reh'g denied, trans. denied* (coal mining company's breach of implied warranty claim against manufacturer of allegedly defective excavator sounded in contract and could form an alternative basis for recovery, following dismissal of claim under Products Liability Act); *see also B & B Paint Corp. v. Shrock Mfg., Inc.*, 568 N.E.2d 1017, 1019 (Ind. Ct. App. 1991) (adoption of the Product Liability Act did not vitiate provisions of the Uniform Commercial Code). The UCC, which has been codified at Indiana Code Article 26-1, provides a remedy for a seller's breach of implied warranties of merchantability and fitness for a particular use. *See* I.C. §§ 26-1-2-314; -315. Whereas a breach of warranty claim that is based on contract may be raised under the UCC independently of the Act, a warranty claim that sounds in tort is “redundant with strict liability claims under the [Act].” *Atkinson v. P&G-Clairol, Inc.*, 813 F. Supp. 2d 1021, 1024 (N.D. Ind. 2011).

The three elements of the instruction must be established to make out a claim for breach of warranty under the Uniform Commercial Code. *Richards v. Goerg Boat & Motors, Inc.*, 179 Ind. App. 102, 109, 384 N.E.2d 1084, 1090 (1979), *questioned on other grounds by Hyundai Motor Am., Inc. v. Goodin*, 822 N.E.2d 947, 958 (Ind. 2005). A common law contract action for breach of warranty requires proof of the same elements. *Peltz Constr. Co. v. Dunham*, 436 N.E.2d 892, 894 (Ind. Ct. App. 1982); *see also* 6 I.L.E. *Contracts* § 237 (1958). Contract law covers warranty claims for items that are not goods, e.g. services. If a contract has mixed use, goods and services, look to the predominate thrust of the agreement. *Insul-Mark Midwest v. Modern Materials*, 612 N.E.2d 550, 554 (Ind. 1993).

2505 Responsible Cause (Proximate Cause)—Definition

A person's conduct is legally responsible for causing [an injury][property damage][a death] if:

- (1) the [injury][property damage][a death] would not have occurred without the conduct, and
- (2) the [injury][property damage][a death] was a natural, probable, and foreseeable result of the conduct.

This is called a “responsible cause.”

[There can be more than one responsible cause for an injury.]

Comments

Scholars identify the use of legal jargon and arcane legalese as the most serious flaws of contemporary jury instructions. John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1209 (2002). In fact, in one study of 14 jury instructions, the proximate cause instruction produced proportionally the most misunderstanding among laypersons. The study revealed that jurors mistake “proximate cause” for “approximate cause,” “estimated cause,” or some fabrication. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979); *see also* Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L.J. 456, 468 (1962) (“proximate cause” is frequently misinterpreted to mean “probable” or “approximate cause”); James D. Wascher, *The Importance of Juries: The Long March Toward Plain English Jury Instructions*, 19 Chicago Bar Ass’n Record 50, 50–51 (2005) (a Chicago judge reported that he presided over a trial in which the jury sent him a note asking whether proximate cause meant “it’s pretty close to the cause”).

Prosser and Keeton say that proximate cause is “is an unfortunate word, which places entirely the wrong emphasis on the factor of physical or mechanical closeness.” Prosser & Keeton, *The Law of Torts* § 42. They even imply that it was a sin to have coined the term “proximate cause” in the first place. Prosser & Keeton, *The Law of Torts* § 42. (“The word ‘proximate’ is a legacy of Lord Chancellor Bacon, who in his time committed other sins.”) The Committee has determined that use of a term so likely to be misunderstood is against the policy behind clear jury instructions.

There are two types of causation in a negligence case—causation in fact and proximate cause. *See, e.g.*, Prosser & Keeton, *The Law of Torts* §§ 41 (causation in fact), 42 (proximate cause) (5th ed. 1984). Causation in fact is the threshold question of whether “but for” the defendant’s negligent conduct, plaintiff’s harm would not have occurred. Or, to put it another way, plaintiff’s harm would not have occurred without the defendant’s negligent conduct. *Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981) (citing W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971); 21 I.L.E. Negligence § 62 (1959)). Because the consequences of an act go forward to eternity and back before the dawn of human events, there must also be “some reasonable connection between the act or omission

of the defendant and the damage which the plaintiff has suffered.” Prosser & Keeton, *The Law of Torts* § 41. This is proximate cause, and it boils down to “whether the conduct has been so significant and important a cause that the defendant should be legally responsible.” Prosser & Keeton, *The Law of Torts* § 41. Prosser and Keeton therefore suggest that either “responsible cause” or “legal cause” would be a more appropriate term. Prosser & Keeton, *The Law of Torts* § 41. Because use of the term “legal cause” might suggest to the jury that there could also be an “illegal cause,” the Committee selected “responsible cause.”

The Indiana Supreme Court has held that a proximate cause instruction is not *required* to refer to “but for” causation, “so long as the instructions as a whole adequately convey the law in this area.” *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 301 (Ind. 2009). To ensure that the instructions as a whole *do* adequately convey both proximate cause and causation in fact, the Committee has included both concepts in this one instruction. Subpart (1) of the instruction (“the injury would not have occurred without the conduct”) instructs on causation in fact. And because the Indiana Supreme Court has explained proximate cause as the natural and probable consequence of the conduct, subpart (2) of the instruction (“the injury was a natural and probable result of the conduct”) instructs on proximate cause. “A negligent act is said to be the proximate cause of an injury ‘if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.’ ” *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003) (quoting *Bader v. Johnson* 732 N.E.2d 1212, 1218 (Ind. 2000)).

Plaintiff in a negligence action has the burden of proving causation in fact by a preponderance of the evidence. *Turner v. Davis*, 699 N.E.2d 1217 (Ind. Ct. App. 1998) (causation in fact); *Carter v. Aetna Life Ins. Co.*, 217 Ind. 282, 27 N.E.2d 75 (1940) (proximate cause). What is the proximate cause of the injury is ordinarily a question of fact for the jury that becomes a question of law when only a single conclusion can be drawn from the facts. *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101 (Ind. Ct. App. 1999).

The court is not required to repeat the substance of an instruction defining proximate cause, and outlining the necessity of establishing it, in every general instruction relating to the subject of negligence. *Swallow Coach Lines, Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938).

The “conduct” discussed in this Instruction includes acts and omissions. *See, e.g.*, Instruction Nos. 909 and 1107.

There can be more than one responsible cause for an injury. *See, e.g.*, *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006) (“An injury may have more than one proximate cause.”); *Board of Comm’rs v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992) (“There may be more than one proximate cause of an event.”); *Krohn v. Shidler*, 140 Ind. App. 175, 185 (1966) (“It is not necessary that such negligence be the sole proximate cause.”). The bracketed sentence about multiple responsible causes should be given when it is an issue in the case.

2506 Foreseeable—Defined

[An injury][Property damage][A death] is “foreseeable” when a person should realize that [his][her] act or failure to act might cause harm.

Comments

In the context of proximate/responsible cause, the question is whether the injury “is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.” *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 108 (Ind. 2002) (citing *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000)). “The determination of what is reasonably foreseeable is not judged by the subjective opinions of those involved, but is based upon the standard of due care in avoiding a result which might reasonably have been anticipated in the ordinary experience of people.” *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 917–18 (Ind. Ct. App. 2001) (citing *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101, 1105 (Ind. Ct. App. 1999)). When some harm is foreseeable, a person is responsible for any injury even if the extent of the injury was unforeseeable. *Bolin v. Wingert*, 764 N.E.2d 201, 207–08 (Ind. 2002). “If the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor’s negligence.” *Hampton v. Moistner*, 654 N.E.2d 1191, 1194 (Ind. Ct. App. 1995).

2507 Definitions for Breach of Warranty Claims

“Buyer” means a person who buys or contracts to buy goods.

“Course of Dealing” means a sequence of previous conduct between the parties to a particular transaction that establishes a common basis of understanding for interpreting their conduct and communications.

“Fungible goods or securities” are those of which any unit is the equivalent of any other like unit because of its nature or trade usage. Goods that are not fungible shall be considered fungible to the extent that a particular agreement or document treats unlike units as equivalents.

“Goods” mean all things that can be moved at the time they are identifiable as goods to which the contract refers.

[Goods also include money, but only when the parties treat money as a commodity, not when it is merely the price to be paid under the contract.]

[Goods also include investment securities.]

[Goods also include the right to bring a lawsuit based on contract or right to possess personal property.]

[Goods also include growing crops and the unborn young of animals.]

“Merchant” means a person:

- (1) who deals in the type of goods involved in the transaction at issue;
- (2) who otherwise by [his][her] occupation holds [himself][herself] out as having knowledge or skill peculiar to the practices or goods involved in the transaction; or
- (3) who employs an agent, broker, or other intermediary who by [his][her] occupation holds [himself][herself] out as having that knowledge or skill.

“Merchantable Goods”—To be merchantable, goods must at least:

- (1) pass without objection in the trade under the contract description;
- (2) in the case of fungible goods, be of fair, average quality within the description;
- (3) be fit for the ordinary purposes for which such goods are used;
- (4) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved;
- (5) be adequately contained, packaged, and labeled as the agreement may require; and
- (6) conform to any promises or statements of fact made on the container or label.

“Seller” means a person who sells or contracts to sell goods.

“Trade usage” [“Usage of trade”] is a common and regular practice or method of dealing in a place, vocation, or trade that justifies an expectation by the parties to a

transaction that the same practice or method of dealing will apply to their transaction. “Warranty” is an assurance or guaranty, either express, in the form of a statement by a seller of goods, or implied by law, having reference to and ensuring the goods’ character, quality, or fitness for a particular purpose.

Comments

Indiana Code § 26-1-2-105(1) defines “goods.” Investment securities are goods under the U.C.C. *Thomas v. Hemmelgarn*, 579 N.E.2d 1333, 1337 (Ind. Ct. App. 1991). For the definition of “goods,” the committee recommends that the judge give only the bracketed language that is at issue in the case.

Indiana Code § 26-1-1-205(3) defines “usage of trade.” The existence and scope of trade usage are to be proved as facts. Ind. Code § 26-1-1-205(3). If it is established that trade usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court. Ind. Code § 26-1-1-205(3). Evidence of a relevant trade usage offered by one party is not admissible unless and until that party has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter. Ind. Code § 26-1-1-205(7).

Indiana Code § 26-1-1-205(4)–(6) state:

- (4) A course of dealing or course of performance between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
- (5) Except as provided in subsection (8), the express terms of an agreement and an applicable course of dealing, course of performance, or usage of trade shall be construed wherever reasonable as consistent with each other. If such a construction is unreasonable:
 - (a) express terms prevail over course of dealing and course of performance;
 - (b) course of performance prevails over course of dealing and usage of trade; and
 - (c) course of dealing prevails over usage of trade.
- (6) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

The following statutes define other terms in this instruction: Ind. Code §§ 26-1-2-103(1)(a) (buyer); 26-1-1-205(1) (course of dealing); 26-1-1-201(17) (fungible goods or securities); 26-1-2-104(1) (merchant); 26-1-2-314(2) (merchantable goods); 26-1-2-103(1)(d) (seller).

2509 Express Warranties by Statement, Promise, Description or Sample

A seller creates an "express warranty" in the following ways:

- (1) any statement of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the statement or promise;
- (2) any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods will conform to the description; or
- (3) any sample or model that is made part of the basis of the bargain creates an express warranty that all of the goods will conform to the sample or model.

Comments

The model instruction is based upon the provisions of Ind. Code § 26-1-2-313(1), which provides:

Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

An express warranty requires some representation, term, or statement as to how the product is warranted. *Martin Rispens & Son v. Hall Farms*, 621 N.E.2d 1078, 1082 (Ind. 1993). A seller may create an express warranty if he asserts a fact of which the buyer is ignorant, but not if he merely states an opinion on a matter on which the seller has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment. *Martin Rispens & Son*, 621 N.E.2d 1078, 1082 ("top quality" on label did not create an express warranty, as it was mere puffery, but "with high vitality, vigor and germination" did create an express warranty that the product would perform in a certain manner); *see also Carpetland U.S.A. v. Payne*, 536 N.E.2d 306, 308 (Ind. Ct. App. 1989) (seller's assurance that carpet would be replaced if any defects surfaced within one year of purchase created an express warranty; *Perfection Cut, Inc. v. Olsen*, 470 N.E.2d 94, 95 (Ind. Ct. App. 1984) (seller's statement that machine had a new engine created an express warranty).

General statements to the effect that goods are "the best," are "of good quality," or will "last a lifetime," and be "in perfect condition" are generally regarded as expressions of the seller's opinion or "the puffing of his wares" and do not create an express warranty. *Royal Bus. Machs. v. Lorraine Corp.*, 633 F.2d 34, 42 (7th Cir. 1980).

2511 Warranty Not Created by Mere Opinion or Commendation

To create an express warranty, the seller does not have to use formal words such as “warrant” or “guarantee,” or have a specific intention to make a “warranty.” However, neither a seller’s mere affirmation of the value of the goods nor the seller’s opinion or praise of the goods creates a warranty.

Comments

Indiana Code § 26-1-2-313(2) states:

It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

An express warranty requires some representation, term, or statement as to how the product is warranted. *Martin Rispens & Son v. Hall Farms, Inc.*, 621 N.E.2d 1078, 1082 (Ind. 1993). A seller may create an express warranty if he asserts a fact of which the buyer is ignorant, but not if he merely states an opinion on a matter on which the seller has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment. *Martin Rispens & Son*, 621 N.E.2d 1078, 1082 (“top quality” on label did not create an express warranty, as it was mere puffery, but “with high vitality, vigor and germination” did create an express warranty that the product would perform in a certain manner); *see also Carpetland U.S.A. v. Payne*, 536 N.E.2d 306, 308 (Ind. Ct. App. 1989) (seller’s assurance that carpet would be replaced if any defects surfaced within one year of purchase created an express warranty; *Perfection Cut, Inc. v. Olsen*, 470 N.E.2d 94, 95 (Ind. Ct. App. 1984) (seller’s statement that machine had a new engine created an express warranty).

General statements to the effect that goods are “the best,” are “of good quality,” or will “last a lifetime,” and be “in perfect condition” are generally regarded as expressions of the seller’s opinion or “the puffing of his wares” and do not create an express warranty. *Royal Bus. Machs. v. Lorraine Corp.*, 633 F.2d 34, 42 (7th Cir. 1980).

2513 Types of Implied Warranties

There are three types of implied warranties:

- (1) the implied warranty of merchantability;
- (2) the implied warranty of fitness for a particular purpose; and
- (3) warranties arising from a course of dealing or trade usage.

Comments

Ind. Code §§ 26-1-2-314, -315.

Prod. Liability:
Warranty

2515 Implied Warranty of Merchantability

Unless excluded or modified, a warranty that the goods are merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

[The serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.]

Comments

This instruction is based on Ind. Code § 26-1-2-314(1). If this instruction is given, Instruction No. 2521 should also be given.

2517 Implied Warranties Arising from Course of Dealing or Use of Trade

A course of dealing or trade usage may create implied warranties, unless those warranties are excluded or modified.

A course of dealing or trade usage of which the parties are or should be aware may give particular meaning to, and supplement or qualify, terms of an agreement.

Wherever reasonable, you must interpret the express terms of an agreement and an applicable course of dealing or trade usage as consistent with each other. However, if that interpretation is unreasonable, the express terms of the agreement are controlling.

When interpreting the agreement, use the applicable trade usage in the place where the parties perform any part of the agreement.

Comments

Indiana Code § 26-1-2-314(3) states, "Unless excluded or modified (IC 26-1-2-316), other implied warranties may arise from course of dealing or usage of trade."

If this instruction is given, Instruction No. 2521 should also be given.

2519 Implied Warranty of Fitness for a Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods will be fit for that purpose.

Comments

This instruction is based on Ind. Code § 26-1-2-315. If this instruction is given, Instruction No. 2521 should also be given.

2521 Exclusion or Modification of Warranties

[Subject to the issue in this case, select the appropriate paragraph(s) noted below.]

[General rule of construction]

When reasonable, interpret words or conduct relevant to the creation of an express warranty as consistent with words or conduct that tends to deny or limit that warranty. If you cannot do this, the attempt to deny or limit the warranty has no effect.

[Implied warranty of merchantability]

To exclude or modify the implied warranty of merchantability or any part of it, a merchant's language must mention merchantability and, if in writing, must be conspicuous.

[Implied warranty of fitness for a particular purpose]

A merchant's exclusion or modification of the implied warranty of fitness for a particular purpose must be in writing and conspicuous. [A (seller)(merchant) can exclude all warranties of fitness for a particular purpose by writing, for example, "There are no warranties that extend beyond the description on the face hereof."]

["As is," etc.]

Unless the circumstances indicate otherwise, a merchant excludes all implied warranties by conspicuously writing "as is," "with all faults," or other language that in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there are no implied warranties.

[Examination of Goods by Buyer]

If the buyer, before entering into the agreement, examined the goods [or a sample or model] as fully as the buyer desired, or refused to examine the goods, there is no implied warranty regarding defects that the buyer's examination should have revealed.

[Course of Dealing, Course of Performance, Trade Usage]

An implied warranty may be excluded or modified by [course of dealing][course of performance][trade usage].

[Livestock]

There is no implied warranty that cattle, hogs, or sheep are free from disease, if the seller shows compliance with all state and federal regulations concerning animal health.

Comments

Indiana Code § 26-1-2-316 provides for both general and particularized circumstances where an implied warranty of fitness or an implied warranty of merchantability may be excluded or modified. The court should usually give the bracketed language on the general rules of construction. The court should also give either the bracketed language on the exclusion or modification of the implied warranty of merchantability or the bracketed language on the exclusion or modification of the implied warranty of fitness, or both if the evidence warrants. The remaining

bracketed language deals with particular circumstances and should be given as the evidence requires.

Indiana Code § 26-1-2-316(3)(e) discusses audio or visual catalog sales.

It is a well established principle of law that a party who is not a party to a contract is not bound by its terms. It is the duty of the jury to determine whether or not the party is a party to the contract.

The jury should determine whether or not the party is a party to the contract. If the party is a party to the contract, the jury should determine whether or not the party is bound by its terms.

The jury should determine whether or not the party is a party to the contract. If the party is a party to the contract, the jury should determine whether or not the party is bound by its terms.

The jury should determine whether or not the party is a party to the contract. If the party is a party to the contract, the jury should determine whether or not the party is bound by its terms.

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The jury should determine whether or not the party is a party to the contract. If the party is a party to the contract, the jury should determine whether or not the party is bound by its terms.

Indiana Code § 26-1-2-316 provides for the following circumstances:

The jury should determine whether or not the party is a party to the contract. If the party is a party to the contract, the jury should determine whether or not the party is bound by its terms.

2523 Cumulation and Conflict of Warranties Express or Implied

You must interpret express and implied warranties as consistent with each other and as cumulative. However, if that interpretation is unreasonable, the parties' intent determines which warranty is controlling. To determine that intent, the following rules apply:

- (1) exact or technical specifications replace an inconsistent sample, model, or general language of description,
- (2) a sample from an existing bulk replaces inconsistent general language of description, and
- (3) express warranties replace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

Comments

This instruction is based on Ind. Code § 26-1-2-317.

2525 Third Party Beneficiaries of Warranties

A seller's express or implied warranty applies to a person injured by the breach of the warranty if it is reasonable to expect that person may use, consume, or be affected by the goods, and the person is a member of the buyer's family or household, or is a guest in the buyer's home. A seller may not exclude or limit the operation of this rule.

Comments

This instruction is based on Ind. Code § 26-1-2-318.

2527 Measure of Damages—Warranty Cases

If you decide from the greater weight of the evidence that [*defendant*] is liable to [*plaintiff*], then you must decide the amount of money that will fairly compensate [*plaintiff*].

In deciding the amount of money you award, you may consider:

1. The difference between the value of the goods at the time of delivery and the value had the goods complied with the warranty; and,
2. Any additional loss that [*defendant*] knew or had reason to know that [*plaintiff*] would suffer as result of the breach of warranty.

Comments

Indiana Code § 26-1-2-714 defines damages for breach for accepted goods. Indiana Code 26-1-2-715 defines damages for incidental and consequential damages.

Where the buyer has accepted goods and given notification, buyer may recover damages. "Notification" is defined at Ind. Code § 26-1-1-201(26).

See also, *Coyle Chevrolet Co. v. Carrier*, 397 N.E.2d 1283, 1287 (Ind. Ct. App. 1979).

CHAPTER 2700

DEFAMATION

SYNOPSIS

Introduction

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- 2705 Libel—Definition
- 2707 Slander—Definition
- 2709 Defamatory Per Se—Definition
- 2711 Defamatory Per Quod—Definition
- 2713 Reasonable Care—Definition
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Introduction

Defamation is an attack upon the reputation or character of another that results in injury.¹ A communication is defamatory if it tends to harm the reputation of another so as to lower him in the eyes of the community or to deter third persons from associating or dealing with him.²

The law of defamation historically has been divided into libel and slander, which are methods of defamation.³ Libel is a written defamation while slander is an oral or spoken defamation of character or reputation. Libel can be expressed either in writing or by print, signs, pictures, effigies, or the like.⁴ Historically, different legal standards have been applied to libel and slander in some circumstances. Unless those circumstances are present in a case, the committee recommends that the generic term “defamation” be used in jury instructions.

In an action for defamation, the defamatory meaning of words can be apparent on the face of the words (*per se*) or apparent only by reference to extrinsic facts and circumstances (*per quod*).⁵ Other times, the terms “*per se*” and “*per quod*” are used in reference to whether a defamatory statement falls into one of four categories: criminal conduct, a loathsome disease, sexual misconduct, or misconduct in a person’s trade, profession, office, or occupation.⁶ Defamatory statements have thus been classified as libel *per se*, libel *per quod*, slander *per se*, or slander *per quod* (sometimes merely called “slander”).⁷

Classifying statements in this manner has consequences with respect to how the plaintiff pleads and proves a case. The main consequence of the classification is whether a plaintiff is entitled to presumed damages, a matter that should be resolved at the earliest opportunity. Courts should also pay special attention to the type of plaintiff (public official, public figure, or private figure), matter at issue (public concern or private concern), and type of defendant (media or non-media). For a more thorough discussion of the varying types of defamation and the complicated consequences of

¹ 18 I.L.E. Libel and Slander § 1.

² *Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 372 N.E.2d 1211 (1978). Defamation has also been defined as that which tends to injure reputation or to diminish the esteem, respect, goodwill, or confidence in the plaintiff or to excite derogatory feelings or opinions about the plaintiff. *Shallenberger v. Scoggins-Tomlinson, Inc.*, 439 N.E.2d 699 (Ind. Ct. App. 1982).

³ *Gibson v. Kincaid*, 140 Ind. App. 186, 221 N.E.2d 834 (1967) (Faulconer, J., concurring); see also 53 C.J.S. Libel and Slander § 2.

⁴ *Cronin v. Zimmerman*, 44 Ind. App. 118, 88 N.E. 718 (1909).

⁵ *Jacobs v. City of Columbus Police Dep’t*, 454 N.E.2d 1253 (Ind. Ct. App. 1983); see also *Dugan v. Mittal Steel USA, Inc.*, 929 N.E.2d 184 (Ind. 2010).

⁶ *Kelley v. Tanoos*, 865 N.E.2d 593, 596 (Ind. 2007).

⁷ *Norton v. Cooley*, 146 Ind. App. 514, 257 N.E.2d 323 (1970); see also *Hotel & Restaurant Emps. & Bartenders Int’l Union v. Zurzolo*, 142 Ind. 242, 233 N.E.2d 784 (1968).

their classification, the trial judge is encouraged to read the law review article written by the staff attorney assisting the Committee.⁸

The interplay of the First Amendment and the common law of defamation is also complicated. This is especially true in Indiana, as Indiana court decisions impose a more stringent quantum of proof upon the private figure plaintiff who brings an action against a media defendant or who complains of speech addressing a matter of public concern, than is required by the decisions of the United States Supreme Court.⁹ The Committee therefore rewrote Instruction Nos. 2715 to 2729 to make it easier for judges to instruct on the varying types of defamation cases. These new instructions are an attempt to state the elements, burdens of proof, and damages in eight different types of defamation cases. More explanation about the new instructions is contained in the Comments to Instruction No. 2715.

Pre-trial procedures should clarify the issues that require a decision by the judge. Issues decided by a judge are removed from the jury's decision, so many of the difficult issues in defamation cases will not require jury instructions. In all defamation cases, the trial judge must decide initially if a statement is defamatory.¹⁰ The communication is viewed in context and given its plain and natural meaning.¹¹ If the statement is defamatory, the jury should be so instructed.¹² If a statement is not defamatory, the case will presumably be ended before trial. Only if a statement is susceptible to both defamatory and non-defamatory meanings is the issue of whether a statement is defamatory left to the jury.¹³

In cases with a media defendant the trial judge, and not the jury, must decide if a plaintiff is a public figure,¹⁴ and if a controversy addresses a matter of public concern.¹⁵ Therefore, no jury instructions on these issues are required. The trial judge must decide

⁸ Julie C. Sipe, "Old Stinking, Old Nasty, Old Itchy Old Toad": Defamation Law, Warts and All (A Call for Reform), 41 Ind. L. Rev. 137 (2008).

⁹ *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 454 (Ind. 1999).

¹⁰ *Rambo v. Cohen*, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992). ("Initially, the determination of whether a communication is defamatory is a question of law for the court; it is to be presented to the jury as a question of fact only if the communication is reasonably susceptible to either defamatory or non-defamatory interpretation. In making the determination, the communication is to be viewed in context and given its plain and natural meaning, 'according to the idea they are calculated to convey to whom [it is] addressed.'"); see also, e.g., *Heeb v. Smith*, 613 N.E.2d 416, 422-23 (Ind. Ct. App. 1993).

¹¹ *Rambo*, 587 N.E.2d at 145.

¹² *Rambo*, 587 N.E.2d at 145.

¹³ *Rambo*, 587 N.E.2d at 145.

¹⁴ *Bandido's*, 712 N.E.2d at 454 ("Whether an individual is a public figure is a question of law for the court to resolve.") (citing *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966)).

¹⁵ *Bandido's*, 712 N.E.2d at 452 ("During trial, the jury was instructed that if the material published concerned an event of public or general concern, then Bandido's was required by *Aafco* to prove actual malice. A determination of whether a controversy is of general or public concern is a question of law to be determined by the trial judge and not the jury. Consequently, it was error for the court to provide this instruction.").

if sufficient evidence supports a finding of actual malice before sending the matter to the jury.¹⁶ Actual malice must be shown by clear and convincing evidence.¹⁷

Case law supports requiring a plaintiff to prove that the defendant's communication was the responsible cause of any special damages other than presumed damages. *See State Farm Fire & Cas. Co. v. Radcliff*, 987 N.E.2d 121, 153 (Ind. Ct. App. 2013) ("A plaintiff pleading special damages due to defamation, whether per quod or per se, must plead and demonstrate that the special damages were incurred as a natural and proximate consequence of the wrongful act.") (citing *N. Ind. Pub. Serv. Co. v. Dabagia*, 721 N.E.2d 294, 304 (Ind.Ct.App.1999)); *Stanley v. Kelley*, 422 N.E.2d 663, 668–69 (Ind. Ct. App. 1981) ("In a defamation action, there are generally two classes of compensatory damages. The first is general damages, injury to the plaintiff's reputation, and standing in the community, personal humiliation, and mental anguish and suffering, which damages the law presumes to be the natural, proximate and necessary result of publication. The second class is special damages, pecuniary in nature, which damages are not assumed to be necessary or inevitable but must be shown by allegation and specific proof to have been actually incurred as a natural and proximate consequence of the wrongful act."), *rejected in part on other grounds by Bochnowski v. Peoples Federal Sav. & Loan Ass'n*, 571 N.E.2d 282, 284 (Ind. 1991); *see also Lessley v. City of Madison, Ind.*, 654 F. Supp.2d 877, 912 (S.D. Ind. 2009).

¹⁶ *Ratcliff v. Barnes*, 750 N.E.2d 433, 437 (Ind. Ct. App. 2001) ("The initial question of whether there is sufficient evidence to support a finding of actual malice is a question of law to be determined by the court."). Although the U.S. Supreme Court has never said so, a number of federal appeals cases have expressly stated that actual malice is a question of fact at trial. *See, e.g., Bichler v. Union Bank & Trust Co.*, 745 F.2d 1006, 1010-11 (6th Cir. 1984). On appeal, however, whether the evidence supports a finding of actual malice is a question of law. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989) (citing *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510–11 (1984)). The reason for this distinction is that "[j]udges, as expositors of the Constitution" have a duty to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose*, 466 U.S. at 511.

¹⁷ *Bandido's*, 712 N.E.2d at 469 (Boehm, J., concurring) ("Specifically, I agree that the 'actual malice' standard should be applied to reports on matters of public concern, and that clear and convincing evidence should be required for a defamation recovery on a matter of public concern."); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 773 (1986) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)).

2701 Nature of Plaintiff's Claim

[*Plaintiff*] claims that [*defendant*] has defamed [*her*][*him*][*it*] and that [*she*][*he*][*it*] is entitled to damages.

Comments

This introductory instruction is purely optional, and should be amended or dispensed within the court's discretion and in light of the factual situation. For rules of pleading in actions for libel and slander, *see* Ind. Code § 34-15-1-1.

2703 Defamation—Definition

Defamation is defined as words, statements, or other forms of expression that tend to lower a person's reputation in the community or to discourage others from dealing or associating with the person.

Comments

This definition is adapted from *Kelley v. Tanoos*, 865 N.E.2d 593 (Ind. 2007). Defamatory statements are also defined as those that tend to injure reputation, or to diminish esteem, respect, goodwill, or confidence in the plaintiff, or to excite derogatory feelings or opinions about the plaintiff; however, defamatory statements necessarily involve the idea of disgrace. *Shallenberger v. Scoggins-Tomlinson, Inc.*, 439 N.E.2d 699 (Ind. Ct. App. 1982); *Daugherty v. Allen*, 729 N.E.2d 228, 237 n.8 (Ind. Ct. App. 2000); see also *Independent Workers of Noble County, Inc. v. International Brotherhood of Elec. Workers*, 273 F. Supp. 313 (N.D. Ind. 1967).

A defamatory communication is defined as one that “tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 451 (Ind. 1999) (citations omitted); see also *Kelley*, 865 N.E.2d 593.

It is a question of law for the court to decide whether a statement considered in its entirety is capable of possessing a defamatory meaning or implication. If a statement is susceptible to both defamatory and non-defamatory meanings, the matter of interpretation should be left to the jury. *Bandido's, Inc.*, 712 N.E.2d at 457.

2705 Libel—Definition

Libel is the defamation of a person or entity by writing, printing, signs, pictures, effigies, or the like.

Comments

If the judge has determined that the communication at issue is libel, this instruction may be unnecessary. Libel is a species of defamation under Indiana law. *Branham v. Celadon Trucking Servs.*, 744 N.E.2d 514, 522 (Ind. Ct. App. 2001).

Libel has been defined as defamation expressed either by writing or printing or by signs, pictures, effigies, or the like, tending to vilify the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or publish the natural or alleged defects of one who is alive and thereby expose him to public hatred or ridicule or cause him to be shunned, avoided, or injured. *See Cronin v. Zimmerman*, 44 Ind. App. 118, 88 N.E. 718 (1909); *Perry v. C.B.S., Inc.*, 499 F.2d 797 (7th Cir. 1974).

“Although Indiana and most other jurisdictions recognize the common law distinction between libel and slander, this view has been criticized by scholars as archaic and its abolition is strongly advocated.” *Gibson v. Kincaid*, 140 Ind. App. 186, 221 N.E.2d 834, 842 (1966); *see also* Julie C. Sipe, “Old Stinking, Old Nasty, Old Itchy Old Toad”: *Defamation Law, Warts and All (A Call for Reform)*, 41 Ind. L. Rev. 137, 145–49 (2008).

For further discussion on the distinction between libel and slander, *see* Dan B. Dobbs, *The Law of Torts* § 408 at 1141 (2001).

2707 Slander—Definition

Slander is the defamation of a person or entity by spoken words.

Comments

If the judge has determined that the communication at issue is slander, this instruction may be unnecessary. Slander is a species of defamation under Indiana law. *Indiana Ins. Co. v. North Vermillion Community Sch. Corp.*, 665 N.E.2d 630, 635 (Ind. Ct. App. 1996).

Slander may be defined as the speaking of base and defamatory words. *Branaman v. Hinkle*, 137 Ind. 496, 37 N.E. 546, 548 (1894); 53 C.J.S. *Libel and Slander* § 2(c)–(d).

“Although Indiana and most other jurisdictions recognize the common law distinction between libel and slander, this view has been criticised by scholars as archaic and its abolition is strongly advocated.” *Gibson v. Kincaid*, 221 N.E.2d 834, 842 (Ind. Ct. App. 1966); see also Julie C. Sipe, “Old Stinking, Old Nasty, Old Itchy Old Toad”: *Defamation Law, Warts and All (A Call for Reform)*, 41 Ind. L. Rev. 137, 145–49 (2008).

For further discussion on the distinction between libel and slander, see Dan B. Dobbs, *The Law of Torts* § 408 at 1141 (2001).

2709 Defamatory Per Se—Definition

[The Committee recommends that no instruction be given on the definition of defamation per se or defamation per quod because the question of whether the defamatory words are defamation per se or defamation per quod is most likely a legal question to be determined by the court. See the comments to this Instruction for various definitions of defamation per se and per quod and more information.]

Comments

Indiana cases have held that “per se” means several different things.

The Indiana Court of Appeals explained that generally, “‘[p]er se’ is used to designate words whose defamatory nature appears without consideration of extrinsic facts.” *Hotel & Restaurant Employees & Bartenders Int’l Union v. Zurzolo*, 142 Ind. App. 242, 233 N.E.2d 784, 790 (1968).

The Indiana Supreme Court recently stated its own definition of “per se”: “A communication is defamatory per se if it imputes: (1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person’s trade, profession, office, or occupation; or (4) sexual misconduct.” *Kelley v. Tanoos*, 865 N.E.2d 593, 596–97 (2007) (citing *Rambo v. Cohen*, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992)). *Trail v. Boys & Girls Clubs*, 845 N.E.2d 130, 137 (Ind. 2006), uses this same definition.

Tracing the citations back through case law leads to the Restatement 2d Torts § 570, which lists those elements, more or less: “(a) a criminal offense . . . , (2) a loathsome disease . . . , (c) matter incompatible with [the plaintiff’s] business, trade, profession, or office . . . , (d) serious sexual misconduct.” The court determines whether spoken language imputing a crime, disease, or sexual misconduct is of such a character to be actionable per se. Restatement 2d Torts § 615(1) at 313. “Subject to the control of the court,” the jury determines whether spoken language imputes business misconduct, so that the slander would be actionable per se. Restatement 2d Torts § 615(2) at 313.

The Restatement does not speak of defamation per se, but rather slander actionable without proof of special harm. Restatement 2d Torts § 615(2) at 313. A separate section of the Restatement addresses libel and provides that all libel is actionable without proof of special harm. Restatement 2d Torts § 569 (1977).

Older Indiana case law is even more complicated. In 1967, the Indiana Court of Appeals stated:

It is generally agreed that words are actionable without allegation and proof of special damage when:

(1) Words, whether they be in the form of libel or slander, which are defamatory *per se* or *per quod*, which (a) impute to another the commission of an indictable offense punishable by imprisonment; (b) impute to another a loathsome disease; (c) tend to injure another in his office, profession, trade, business or calling; or (d) impute unchastity to a woman.

(2) Words in the form of libel which, on their face, without resort to extrinsic facts or circumstances, that is to say, ‘*per se*’ tend to degrade another person, impeach his honesty, integrity, or reputation, or bring him into contempt,

hatred, ridicule, or causes him to be shunned or avoided.

Gibson v. Kincaid, 221 N.E.2d 834, 843 (1966). And in 1968, the Indiana Court of Appeals explained the distinction slightly differently:

When we say that words are actionable only upon proof of 'special' damage, we mean special in the sense that it must be supported by specific proof, as distinct from the damage assumed to follow in the case of libel *per se*, or libel *per quod* which falls into one of the four special categories of slander *per se*. In other words, special damages must be proved in the case of slander or libel *per quod* that does not involve the imputation of a crime, a loathsome disease, unchastity, or injury to the plaintiff's business, profession, trade or office.

Zurzolo, 233 N.E.2d at 790.

The Committee believes that Judge Faulconer's concurring opinion in *Gibson* contains the best explanation of how the *per se/per quod* distinction should be handled under current Indiana law. He explained that words that are defamatory *per se* (those whose defamatory nature is apparent on their face) may be in the form of a libel or slander. Where the defamatory words constitute libel or slander *per se*, the plaintiff need not plead or prove special damages in order to recover for the alleged defamation if the words: (a) impute a criminal act, (b) impute a loathsome disease, (c) impute sexual misconduct, or (d) injure another in his trade, business, profession, or office. *Gibson v. Kincaid*, 221 N.E.2d at 843 (Faulconer, J., concurring).

The consequence of the *per se/per quod* distinction is whether damages are presumed or must be proven, which is discussed further in the comments to Instruction No. 2715.

For a discussion suggesting that the *per se/per quod* distinction should be abandoned, see Julie C. Sipe, "Old Stinking, Old Nasty, Old Itchy Old Toad": Defamation Law, Warts and All (A Call for Reform), 41 Ind. L. Rev. 137, 149-51 (2008).

2711 Defamatory Per Quod—Definition

[The Committee recommends that no instruction be given on the definition of defamation per se or defamation per quod because the question of whether the defamatory words are defamation per se or defamation per quod is most likely a legal question to be determined by the court. See the comments to this Instruction for various definitions of defamation per se and per quod and more information.]

Comments

Because of the confusion surrounding the definition of “per se” in Indiana discussed in the comments to the preceding Instruction, the definition of “per quod” is likewise unclear. The Committee believes that Judge Faulconer’s concurring opinion in *Gibson* contains the best explanation of how the per se/per quod distinction should be handled under current Indiana law. He explained that words that are defamatory per se (those whose defamatory nature is apparent on their face) may be in the form of a libel or slander. Where the defamatory words constitute libel or slander per se, the plaintiff need not plead or prove special damages in order to recover for the alleged defamation if the words: (a) impute a criminal act, (b) impute a loathsome disease, (c) impute sexual misconduct, or (d) injure another in his trade, business, profession, or office. *Gibson v. Kincaid*, 221 N.E.2d 834, 843 (1966) (Faulconer, J., concurring).

The consequence of the per se/per quod distinction is whether damages are presumed or must be proven, which is discussed further in the comments to Instruction No. 2715.

For a discussion suggesting that the per se/per quod distinction should be abandoned, see Julie C. Sipe, “Old Stinking, Old Nasty, Old Itchy Old Toad”: Defamation Law, Warts and All (A Call for Reform), 41 Ind. L. Rev. 137, 149–51 (2008).

2713 Reasonable Care—Definition

Reasonable care means being careful and using good judgment and common sense.

Comments

This instruction should only be given in conjunction with Instruction Nos. 2723–2739.

Negligence consists of the failure to use reasonable care, due care, or ordinary care, which is measured by the care a person of reasonable prudence would ordinarily exercise under like conditions and circumstances. *Central Transport, Inc. v. Great Dane Trailers, Inc.*, 423 N.E.2d 675 (Ind. Ct. App. 1981); *Southern Ry. Co. v. Harpe*, 223 Ind. 124, 58 N.E.2d 346 (1944); *Tabor v. Continental Baking Co.*, 110 Ind. App. 633, 38 N.E.2d 257 (1941); *Cleveland, C., C. & S. L. Ry. Co. v. Jones*, 51 Ind. App. 245, 99 N.E. 503 (1912).

When found to exist, the duty to exercise reasonable care under the circumstances never changes; however, the standard of conduct required to measure up to that duty varies depending upon the particular circumstances. *Franklin v. Benock*, 722 N.E.2d 874 (Ind. Ct. App. 2000).

In Indiana there are no degrees of care. The use of such terms as slight care, great care, highest degree of care, or other like expressions in instructions as indicating the quantum of care the law exacts under special conditions and circumstances is misleading. *Thompson v. Ashba*, 122 Ind. App. 58, 102 N.E.2d 519 (1951); *Midwest Motor Coach Co. v. Elliott*, 95 Ind. App. 64, 182 N.E. 541 (1932).

A person with a mental disability is generally held to the same standard of care as that of a reasonable person under the same circumstances without regard to the person's capacity to control or understand the consequences of his or her actions. See Restatement 2d Torts § 283B (1965); *Creasy v. Rusk*, 730 N.E.2d 659, 667 (Ind. 2000). In *Creasy*, the Supreme Court balanced three factors to determine whether an individual owes a duty to another (the relationship between the parties, whether the harm to the person injured was reasonably foreseeable, and public policy concerns) and held that an Alzheimer patient owed no duty of care to a nursing home assistant who was injured when the patient kicked her.

For the standard of care of children, see Instruction No. 1129 on contributory negligence of children and Instruction No. 927 on comparative fault of children.

2714 Responsible Cause (Proximate Cause)—Definition

A person's conduct is legally responsible for causing [an injury][property damage][a death] if:

- (1) the [injury][property damage][a death] would not have occurred without the conduct, and
- (2) the [injury][property damage][a death] was a natural, probable, and foreseeable result of the conduct.

This is called a "responsible cause."

[There can be more than one responsible cause for an injury.]

Comments

Scholars identify the use of legal jargon and arcane legalese as the most serious flaws of contemporary jury instructions. John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1209 (2002). In fact, in one study of 14 jury instructions, the proximate cause instruction produced proportionally the most misunderstanding among laypersons. The study revealed that jurors mistake "proximate cause" for "approximate cause," "estimated cause," or some fabrication. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979); see also Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L.J. 456, 468 (1962) ("proximate cause" is frequently misinterpreted to mean "probable" or "approximate cause"); James D. Wascher, *The Importance of Juries: The Long March Toward Plain English Jury Instructions*, 19 Chicago Bar Ass'n Record 50, 50-51 (2005) (a Chicago judge reported that he presided over a trial in which the jury sent him a note asking whether proximate cause meant "it's pretty close to the cause").

Prosser and Keeton say that proximate cause is "is an unfortunate word, which places entirely the wrong emphasis on the factor of physical or mechanical closeness." Prosser & Keeton, *The Law of Torts* § 42. They even imply that it was a sin to have coined the term "proximate cause" in the first place. Prosser & Keeton, *The Law of Torts* § 42. ("The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins.") The Committee has determined that use of a term so likely to be misunderstood is against the policy behind clear jury instructions.

There are two types of causation in a negligence case—causation in fact and proximate cause. See, e.g., Prosser & Keeton, *The Law of Torts* §§ 41 (causation in fact), 42 (proximate cause) (5th ed. 1984). Causation in fact is the threshold question of whether "but for" the defendant's negligent conduct, plaintiff's harm would not have occurred. Or, to put it another way, plaintiff's harm would not have occurred without the defendant's negligent conduct. *Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981) (citing W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971); 21 I.L.E. Negligence § 62 (1959)). Because the consequences of an act go forward to eternity and back before the dawn of human events, there must also be "some reasonable connection between the act or omission

of the defendant and the damage which the plaintiff has suffered.” W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971). This is proximate cause, and it boils down to “whether the conduct has been so significant and important a cause that the defendant should be legally responsible.” W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971). Prosser and Keeton therefore suggest that either “responsible cause” or “legal cause” would be a more appropriate term. W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971). Because use of the term “legal cause” might suggest to the jury that there could also be an “illegal cause,” the Committee selected “responsible cause.”

The Indiana Supreme Court has held that a proximate cause instruction is not *required* to refer to “but for” causation, “so long as the instructions as a whole adequately convey the law in this area.” *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 301 (Ind. 2009). To ensure that the instructions as a whole *do* adequately convey both proximate cause and causation in fact, the Committee has included both concepts in this one instruction. Subpart (1) of the instruction (“the injury would not have occurred without the conduct”) instructs on causation in fact. And because the Indiana Supreme Court has explained proximate cause as the natural and probable consequence of the conduct, subpart (2) of the instruction (“the injury was a natural and probable result of the conduct”) instructs on proximate cause. “A negligent act is said to be the proximate cause of an injury ‘if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.’” *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003) (quoting *Bader v. Johnson* 732 N.E.2d 1212, 1218 (Ind. 2000)).

Plaintiff in a negligence action has the burden of proving causation in fact by a preponderance of the evidence. *Turner v. Davis*, 699 N.E.2d 1217 (Ind. Ct. App. 1998) (causation in fact); *Carter v. Aetna Life Ins. Co.*, 217 Ind. 282, 27 N.E.2d 75 (1940) (proximate cause). What is the proximate cause of the injury is ordinarily a question of fact for the jury that becomes a question of law when only a single conclusion can be drawn from the facts. *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101 (Ind. Ct. App. 1999).

The court is not required to repeat the substance of an instruction defining proximate cause, and outlining the necessity of establishing it, in every general instruction relating to the subject of negligence. *Swallow Coach Lines, Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938).

The “conduct” discussed in this Instruction includes acts and omissions. *See, e.g.*, Instruction Nos. 909 and 1107.

There can be more than one responsible cause for an injury. *See, e.g.*, *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006) (“An injury may have more than one proximate cause.”); *Board of Comm’rs v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992) (“There may be more than one proximate cause of an event.”); *Krohn v. Shidler*, 140 Ind. App. 175, 185 (1966) (“It is not necessary that such negligence be the sole proximate cause.”). The bracketed sentence about multiple responsible causes should be given when it is an issue in the case.

**2715 Public Official or Public Figure Plaintiff or Matter of Public Concern/
Media Defendant/Presumed Damages**

To recover damages from [defendant],

(A) [Plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] made the following communication: [insert alleged communication];
- (2) the communication was about [plaintiff];
- (3) the communication is of a kind that tends to lower a person's reputation in the community or to discourage others from dealing or associating with the person;
- (4) the communication was [heard][seen][received] by someone other than [plaintiff]; and
- (5) the statement was false.

AND

(B) [plaintiff] must also prove it is highly probable that [defendant] knew the communication was false or had serious doubts as to the truth of the communication.

If you decide in favor of [plaintiff], the law presumes that [plaintiff] has been damaged due to the nature of the statements made, and you may award such presumed damages. These may include reasonable compensation for harm to [plaintiff]'s reputation.

There is no definite standard or method of calculation to decide reasonable compensation for presumed damages. [Plaintiff] is not required to present evidence of actual harm, or the opinion of any witness as to the amount of reasonable compensation. Any award for presumed damages must be just and reasonable.

If you decide in favor of [plaintiff], then in addition to presumed damages, you may also award money for other proven damages caused by [defendant]'s communication. You must determine the amount of money you believe will fairly compensate [plaintiff] for these other proven damages, including, but not limited to:

- (1) personal humiliation;
- (2) mental anguish and suffering;
- (3) physical harm; and
- (4) financial harm, if any, such as loss of business or income.

[Plaintiff] must prove by the greater weight of the evidence that [he][she] actually suffered these other damages and that [defendant]'s communication was a responsible cause of these other damages.

Comments

The Committee rewrote Instruction Nos. 2715 to 2729 to make it easier for judges

to instruct on the varying types of defamation cases. The Indiana Supreme Court has set differing standards of proof in defamation cases than has the U.S. Supreme Court, based on the type of plaintiff (public official, public figure, or private figure), type of matter at issue (public concern or private concern), and type of defendant (media or non-media). These standards are further complicated by whether a plaintiff is entitled to presumed damages. Instruction Nos. 2715 to 2729 are an attempt to state the elements, burdens of proof, and damages in eight different types of defamation cases.

These instructions assume that the parties have argued, and the court has determined, the type of defamation case at bar. If questions remain about the type of plaintiff, concern, defendant, or damages, courts may refer to case law and secondary legal authority for assistance in unraveling each complexity. *See, e.g., Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 451 (Ind. 1999).

Other issues set forth in these instructions may be determined as a matter of law before the case reaches the jury, and those elements should be modified or removed accordingly. For example, if the court determines that the statement at issue was defamatory as a matter of law, the court should instruct the jury that it made that determination and modify element (A)(3) of Instruction Nos. 2715 to 2729 to reflect that determination.

Rather than leading the jury through a series of instructions that use terms of art, and then giving other instructions that define those terms of art, the Committee has replaced terms of art, such as “preponderance of the evidence” with their plain English definitions—“greater weight of the evidence.” The same is true for clear and convincing evidence (“it is highly probable”) and defamatory (“of a kind that tends to lower a person’s reputation in the community or to discourage others from dealing or associating with the person”).

The Committee has also embedded the defamation-specific definitions of “actual malice” and “reckless disregard” in instructions that require the heightened fault standard. *See* Instruction Nos. 2723 to 2729. Those terms are replaced with defendant “knew the communication to be false or, believing it to be true, failed to use reasonable care to determine its truth.” *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964) (defining actual malice as “with knowledge that [a statement] was false or with reckless disregard of whether it was false or not”); *St. Amant v. Thompson*, 390 U.S. 727, 731–32 (1968) (explaining that the touchstone of actual malice is “an awareness . . . of the probable falsity” of the statement and stating that “reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”).

Actual malice may not apply in every defamation case in Indiana. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the U.S. Supreme Court decided that, because First Amendment concerns are reduced in cases involving private plaintiffs, rather than public official or public figure plaintiff cases, each state should choose its own fault standard for those cases. The Indiana Court of Appeals chose its standard in *AAFCO Heating & Air Conditioning Co. v. Northwest Publications Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976), in which it applied the actual malice standard in a case involving a private figure plaintiff (a

heating company), a media defendant (a newspaper), and a matter of public concern (an alleged failure to install properly a furnace that killed two children). The Indiana Supreme Court also applied the actual malice standard in *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446 (Ind. 1999), to a case involving a public figure plaintiff (a restaurant), a media defendant (a newspaper), and a matter of public or general concern (that rodent droppings were allegedly found in the restaurant).

In *Gertz*, the U.S. Supreme Court established that there are general-purpose and limited-purpose public figure plaintiffs. "General purpose public figures are those individuals who 'achieve such pervasive fame or notoriety that [they] become[] a public figure for all purposes and in all contexts.'" *Gertz*, 418 U.S. at 352. Limited-purpose public figures, "thrust[] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. 345.

The Indiana Court of Appeals approved the use of this instruction for a defamation claim brought by a 400-employee construction company and its owner thrust into controversy and the news about a matter involving public controversy, finding that the plaintiffs were limited-purpose public figures. *State Farm Fire & Cas. Co. v. Radcliff*, 987 N.E.2d 121 (Ind. Ct. App. 2013).

Indiana cases have not yet addressed the fault standard in cases involving private figure plaintiffs, non-media defendants, and/or private concerns. In *Beeching v. Levee*, 764 N.E.2d 669, 680 (Ind. Ct. App. 2002), a case involving a private plaintiff (an elementary school principal), a non-media defendant (a teacher's bargaining unit representative), and a matter of private concern (calling the principal a liar in a meeting with teachers), the Indiana Court of Appeals held that the "higher defamation standard in *Bandido's*" (i.e., actual malice) does not apply. The Court of Appeals did not, however, specify what standard of fault would apply, because it did not need to reach that issue. See *Beeching v. Levee*, 764 N.E.2d 669, 680 (Ind. Ct. App. 2002).

The Committee has looked to the *Bandido's* separate opinions for guidance on what standards might apply. In his *Bandido's* dissent, Justice Dickson stated (and Chief Justice Shepard agreed) that, in a private figure plaintiff, media defendant, private concern case, he would make negligence the standard. *Bandido's*, 712 N.E.2d at 473 (Dickson, J., dissenting) ("I respectfully dissent from the majority opinion as to its disapproval of Indiana's traditional common law standard . . . 'negligence' . . . in private defamation cases against media defendants."). In his opinion concurring with the *Bandido's* majority, Justice Boehm appears to agree that negligence would be the standard: "[R]estricting the actual malice requirement to publications on subjects of public concern . . . will leave the vast majority of the six million Hoosiers for whom Chief Justice Shepard expresses concern subject to a simple negligence standard for defamation." *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 471 (Boehm, J., concurring).

The Committee has decided that trial courts need guidance on how to instruct juries in types of cases for which Indiana case law has not yet set the fault standard. It is based on the *Bandido's* separate opinions that the Committee has selected negligence as the standard in defamation cases in which Indiana courts have not decided whether a plaintiff must prove actual malice, Instruction Nos. 2723 to 2729. See *Poyser v. Peerless*, 775 N.E.2d 1101, 1110 (Ind. Ct. App. 2002) (Baker, J.,

concurring) (“*Bandidos* did not address the situation where a private-figure plaintiff sues a nonmedia defendant for defamation involving matters of nonpublic concern. In such a case, it appears at least three members of our supreme court would apply a negligence standard of fault—if not strict liability—rather than actual malice.”). Should Indiana appellate courts reach other conclusions, the Committee will revise the instructions accordingly.

Several of the instructions also have one or two additional elements in subpart (A): “the statement was false” and “plaintiff was damaged as a result.” That the statement was false is required in cases involving media defendants by *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 768–69 (1986). (“Here, we hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.”); Instruction Nos. 2715, 2717, 2723, 2725. And the element of damages is required in cases in which damages are not presumed. See Restatement 2d Torts § 621 (1977); Instruction Nos. 2717, 2721, 2725, 2729.

Unfortunately, the issue of when damages are presumed in defamation cases also remains unclear in Indiana. First, it must be determined whether the defamation was per se or per quod, discussed in the comments to Instruction Nos. 2709 and 2711. Next, a court must decide how this determination affects whether damages are presumed. The Indiana Supreme Court recently stated these damages rules: “In an action for defamation per se the plaintiff ‘is entitled to presumed damages ‘as a natural and probable consequence’ of the per se defamation.’ In an action for defamation per quod, the plaintiff must demonstrate special damages.” *Kelley v. Tanoos*, 865 N.E.2d 593, 597 (Ind. 2007) (citations omitted). “[A] plaintiff in a per quod defamation action can recover for emotional and physical harm only upon a showing of special damages. Emotional and physical harms are not special damages unto themselves, but rather are parasitic damages, viable only when attached to normal (*i.e.*, pecuniary) special damages.” *Rambo v. Cohen*, 587 N.E.2d 140, 146 (Ind. Ct. App. 1992) (citations omitted). “The parasitic damages ride along with special damages; if special damages are alleged and proved, recovery for parasitic damages is possible; if special damages are not alleged and proved, there can be no recovery for the parasitic damages.” *Rambo v. Cohen*, 587 N.E.2d 140, 146 (Ind. Ct. App. 1992) (citations omitted); see also *Cortez v. Jo-Ann Stores, Inc.*, 827 N.E.2d 1223, 1231 (Ind. Ct. App. 2005) (“If a plaintiff in a defamation per quod case cannot demonstrate pecuniary damages, then the plaintiff cannot recover for emotional and physical harm.”) It is unclear whether a plaintiff must prove these “parasitic” damages to recover for them. It is likewise unclear whether general damages and punitive damages are “parasitic,” and whether the plaintiff must prove them.

Decided more than thirty years before *Kelley*, however, U.S. Supreme Court precedent draws the damages rules stated in *Kelley* into question. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), the U.S. Supreme Court said, “[T]he States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth,” in other words, actual malice. A decade after *Gertz*, the U.S. Supreme Court limited that statement in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749, 756, 761 (1985): “[In *Gertz*] we held that a State could not allow recovery of presumed and punitive damages absent a showing of ‘actual malice,’ ” but “[i]n

light of the reduced constitutional value of speech involving no matters of public concern, we hold [today] that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice.’ ” *Dun & Bradstreet, Inc.*, 472 U.S. at 761. To summarize, *Gertz* and *Dun & Bradstreet* appear to mean that, in cases involving matters of public concern, presumed and punitive damages are recoverable only if the plaintiff proves actual malice. In cases involving matters that are not of public concern, presumed and punitive damages may be recoverable without proof of actual malice, although it is not clear whether the plaintiff must prove fault or may recover under a strict liability theory. Further complications in these rules are discussed in Julie C. Sipe, “*Old Stinking, Old Nasty, Old Itchy Old Toad*”: *Defamation Law, Warts and All (A Call for Reform)*, 41 Ind. L. Rev. 137, 149–51 (2008).

These revised defamation instructions, then, leave it to the court to determine whether damages are to be presumed, and the titles of Instruction Nos. 2713 to 2729 clearly delineate whether each instruction contemplates presumed damages. In cases that do not involve presumed damages, a plaintiff does not have to prove all of the types of damages listed in damages subparts (1)–(4) to recover any one of those types of damages. The defendant may allege mitigating circumstances to reduce the amount of damages in all actions for defamation, and mitigation is an affirmative defense. *See* Ind. Code § 34-15-1-2.

With regard to Instruction Nos. 2719 and 2721, it is likewise not yet settled in Indiana whether the clear and convincing evidence standard set forth in subsection (B) of those instructions applies to matters of public concern involving non-media defendants. Again, the Committee set the clear and convincing evidence standard based on how it believes Indiana appellate courts will decide the issue, but will revise these instructions if future cases are decided to the contrary.

With regard to cases involving non-media defendants (*See* Instruction Nos. 2719 and 2721), it is likewise not yet settled in Indiana whether the clear and convincing evidence standard set forth in subsection (B) of those instructions applies to matters of public concern involving non-media defendants. In *State Farm*, 987 N.E.2d at 146, the Court of Appeals suggests in dicta that the clear and convincing standard applies to matters of public concern involving non-media defendants. The Committee set the clear and convincing evidence standard based on how it believes Indiana appellate courts will decide the issue, but will revise these instructions if future cases are decided to the contrary.

The Committee changed the damages language from “must” to “may,” but maintained the requirement that the jury “must determine the amount of money.” This language is more consistent with other instructions, such as 705, 723, 725, 727, 729, 731, 733, and 735. The change in wording addressing damages other than presumed damages tracks the way that other instructions deal with punitive damages in instructions 737 and 741.

Case law supports requiring a plaintiff to prove that the defendant’s communication was the responsible cause of any special damages other than presumed damages. *See State Farm Fire & Cas. Co. v. Radcliff*, 987 N.E.2d 121, 153 (Ind. Ct. App. 2013) (“A plaintiff pleading special damages due to defamation, whether per quod or per se, must plead and demonstrate that the special damages were incurred as a natural and proximate consequence of the wrongful act”) (citing *N. Ind. Pub. Serv.*

Co. v. Dabagia, 721 N.E.2d 294, 304 (Ind. Ct. App. 1999)); *Stanley v. Kelley*, 422 N.E.2d 663, 668–69 (Ind. Ct. App. 1981) (“In a defamation action, there are generally two classes of compensatory damages. The first is general damages, injury to the plaintiff’s reputation, and standing in the community, personal humiliation, and mental anguish and suffering, which damages the law presumes to be the natural, proximate and necessary result of publication. The second class is special damages, pecuniary in nature, which damages are not assumed to be necessary or inevitable but must be shown by allegation and specific proof to have been actually incurred as a natural and proximate consequence of the wrongful act.”), *rejected in part on other grounds by Bochnowski v. Peoples Federal Sav. & Loan Ass’n*, 571 N.E.2d 282, 284 (Ind. 1991); *see also Lessley v. City of Madison, Ind.*, 654 F. Supp.2d 877, 912 (S.D. Ind. 2009).

**2717 Public Official or Public Figure Plaintiff or Matter of Public Concern/
Media Defendant/Without Presumed Damages**

To recover damages from [defendant],

(A) [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] made the following communication: [insert alleged communication];
- (2) the communication was about [plaintiff];
- (3) the communication is of a kind that tends to lower a person's reputation in the community or to discourage others from dealing or associating with the person
- (4) the communication was [heard][seen][received] by someone other than [plaintiff];
- (5) the statement was false; and
- (6) [plaintiff] was damaged as a result of [defendant]'s communication.

AND

(B) [plaintiff] must also prove it is highly probable that [defendant] knew the communication was false or had serious doubts as to the truth of the communication.

If you decide in favor of [plaintiff], you may decide the amount of money that will fairly compensate [plaintiff] for financial harm, if any, caused by [defendant]'s communication, such as loss of business or income. [Plaintiff] must prove by the greater weight of the evidence that [he][she] suffered such financial harm.

If you decide in favor of [plaintiff], then in addition to presumed damages, you may also award money for other proven damages caused by [defendant]'s communication. You must determine the amount of money you believe will fairly compensate [plaintiff] for these other proven damages, including, but not limited to:

- (1) harm to [plaintiff]'s reputation;
- (2) personal humiliation;
- (3) mental anguish and suffering; and
- (4) physical harm.

[Plaintiff] must prove by the greater weight of the evidence that [he][she] actually suffered these other damages and that [defendant]'s communication was a responsible cause of these other damages.

Comments

See Instruction No. 2715 cmt.

**2719 Public Official or Public Figure Plaintiff or Matter of Public Concern/
Non-Media Defendant/Presumed Damages**

To recover damages from [defendant],

(A) [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] made the following communication: [insert alleged communication];
- (2) the communication was about [plaintiff];
- (3) the communication is of a kind that tends to lower a person's reputation in the community or to discourage others from dealing or associating with the person; and
- (4) the communication was [heard][seen][received] by someone other than [plaintiff].

AND

(B) [plaintiff] must also prove it is highly probable that [defendant] knew the communication was false or had serious doubts as to the truth of the communication.

If you decide in favor of [plaintiff], the law presumes that [plaintiff] has been damaged due to the nature of the statements made, and you may award such presumed damages. These may include reasonable compensation for harm to [plaintiff]'s reputation.

There is no definite standard or method of calculation to decide reasonable compensation for presumed damages. [Plaintiff] is not required to present evidence of actual harm, or the opinion of any witness as to the amount of reasonable compensation. Any award for presumed damages must be just and reasonable.

If you decide in favor of [plaintiff], then in addition to presumed damages, you may also award money for other proven damages caused by [defendant]'s communication. You must determine the amount of money you believe will fairly compensate [plaintiff] for these other proven damages, including, but not limited to:

- (1) personal humiliation;
- (2) mental anguish and suffering;
- (3) physical harm; and
- (4) financial harm, if any, such as loss of business or income.

[Plaintiff] must prove by the greater weight of the evidence that [he][she] actually suffered these other damages and that [defendant]'s communication was a responsible cause of these other damages.

Comments

See Instruction No. 2715 cmt.

**2721 Public Official or Public Figure Plaintiff or Matter of Public Concern/
Non-Media Defendant/Without Presumed Damages**

To recover damages from [defendant],

(A) [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] made the following communication: [insert alleged communication];
- (2) the communication was about [plaintiff];
- (3) the communication is of a kind that tends to lower a person's reputation in the community or to discourage others from dealing or associating with the person;
- (4) the communication was [heard][seen][received] by someone other than [plaintiff]; and
- (5) [plaintiff] was damaged as a result of [defendant]'s communication.

AND

(B) [plaintiff] must also prove it is highly probable that [defendant] knew the communication was false or had serious doubts as to the truth of the communication.

If you decide in favor of [plaintiff], you must decide the amount of money that will fairly compensate [plaintiff] for financial harm, if any, caused by [defendant]'s communication, such as loss of business or income. [Plaintiff] must prove by the greater weight of the evidence that [he][she] suffered such financial harm.

If, but only if, you decide that [plaintiff] has proven financial harm, you must also decide the amount of money that will fairly compensate [plaintiff] for other proven damages caused by [defendant]'s communication, including, but not limited to:

- (1) harm to [plaintiff]'s reputation;
- (2) personal humiliation;
- (3) mental anguish and suffering; and
- (4) physical harm.

[Plaintiff] must prove by the greater weight of the evidence that [he][she] actually suffered these other damages and that [defendant]'s communication was a responsible cause of these other damages.

Comments

See Instruction No. 2715 cmt.

2723 Private Figure Plaintiff/No Public Concern/Media Defendant/Presumed Damages

To recover damages from [defendant],

[plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] made the following communication: [insert alleged communication];
- (2) the communication was about [plaintiff];
- (3) the communication is of a kind that tends to lower a person's reputation in the community or to discourage others from dealing or associating with the person;
- (4) the communication was [heard][seen][received] by someone other than [plaintiff];
- (5) the statement was false; and
- (6) [defendant] knew the communication to be false or, believing it to be true, failed to use reasonable care to determine its truth.

If you decide in favor of [plaintiff], the law presumes that [plaintiff] has been damaged due to the nature of the statements made, and you may award such presumed damages. These may include reasonable compensation for harm to [plaintiff]'s reputation.

There is no definite standard or method of calculation to decide reasonable compensation for presumed damages. [Plaintiff] is not required to present evidence of actual harm, or the opinion of any witness as to the amount of reasonable compensation. Any award for presumed damages must be just and reasonable.

If you decide in favor of [plaintiff], then in addition to presumed damages, you may also award money for other proven damages caused by [defendant]'s communication. You must determine the amount of money you believe will fairly compensate [plaintiff] for these other proven damages, including, but not limited to:

- (1) personal humiliation;
- (2) mental anguish and suffering
- (3) physical harm; and
- (4) financial harm, if any, such as loss of business or income.

[Plaintiff] must prove by the greater weight of the evidence that [he][she] actually suffered these other damages and that [defendant]'s communication was a responsible cause of these other damages.

Comments

See Instruction No. 2715 cmt.

2725 Private Figure Plaintiff/No Public Concern/Media Defendant/Without Presumed Damages

To recover damages from [defendant],

[plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] made the following communication: [insert alleged communication];
- (2) the communication was about [plaintiff];
- (3) the communication is of a kind that tends to lower a person's reputation in the community or to discourage others from dealing or associating with the person;
- (4) the communication was [heard][seen][received] by someone other than [plaintiff];
- (5) the statement was false; and
- (6) [defendant] knew the communication to be false or, believing it to be true, failed to use reasonable care to determine its truth; and
- (7) [plaintiff] was damaged as a result of [defendant]'s communication.

If you decide in favor of [plaintiff], you may decide the amount of money that will fairly compensate [plaintiff] for financial harm, if any, caused by [defendant]'s communication, such as loss of business or income. [Plaintiff] must prove by the greater weight of the evidence that [he][she] suffered such financial harm.

If, but only if, you decide that [plaintiff] has proven financial harm, you must also decide the amount of money that will fairly compensate [plaintiff] for other proven damages caused by [defendant]'s communication, including, but not limited to:

- (1) harm to [plaintiff]'s reputation;
- (2) personal humiliation;
- (3) mental anguish and suffering; and
- (4) physical harm.

[Plaintiff] must prove by the greater weight of the evidence that [he][she] actually suffered these other damages and that [defendant]'s communication was a responsible cause of these other damages.

Comments

See Instruction No. 2715 cmt.

2727 Private Figure Plaintiff/No Public Concern/Non-Media Defendant/Presumed Damages

To recover damages from [defendant],

[plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] made the following communication: [insert alleged communication];
- (2) the communication was about [plaintiff];
- (3) the communication is of a kind that tends to lower a person's reputation in the community or to discourage others from dealing or associating with the person;
- (4) the communication was [heard][seen][received] by someone other than [plaintiff]; and
- (5) [defendant] knew the communication to be false or, believing it to be true, failed to use reasonable care to determine its truth.

If you decide in favor of [plaintiff], the law presumes that [plaintiff] has been damaged due to the nature of the statements made, and you may award such presumed damages. These may include reasonable compensation for harm to [plaintiff]'s reputation.

There is no definite standard or method of calculation to decide reasonable compensation for presumed damages. [Plaintiff] is not required to present evidence of actual harm, or the opinion of any witness as to the amount of reasonable compensation. Any award for presumed damages must be just and reasonable.

If you decide in favor of [plaintiff], then in addition to presumed damages, you may also award money for other proven damages caused by [defendant]'s communication. You must determine the amount of money you believe will fairly compensate [plaintiff] for these other proven damages, including, but not limited to:

- (1) personal humiliation;
- (2) mental anguish and suffering;
- (3) physical harm; and
- (4) financial harm, if any, such as loss of business or income.

[Plaintiff] must prove by the greater weight of the evidence that [he][she] actually suffered these other damages and that [defendant]'s communication was a responsible cause of these other damages.

Comments

See Instruction No. 2715 cmt.

2729 Private Figure Plaintiff/No Public Concern/Non-Media Defendant/Without Presumed Damages

To recover damages from [defendant],

[plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] made the following communication: [insert alleged communication];
- (2) the communication was about [plaintiff];
- (3) the communication is of a kind that tends to lower a person's reputation in the community or to discourage others from dealing or associating with the person;
- (4) the communication was [heard][seen][received] by someone other than [plaintiff];
- (5) [defendant] knew the communication to be false or, believing it to be true, failed to use reasonable care to determine its truth; and
- (6) [plaintiff] was damaged as a result of [defendant]'s communication.

If you decide in favor of [plaintiff], you may decide the amount of money that will fairly compensate [plaintiff] for financial harm, if any, caused by [defendant]'s communication, such as loss of business or income. [Plaintiff] must prove by the greater weight of the evidence that [he][she] suffered such financial harm.

If, but only if, you decide that [plaintiff] has proven financial harm, you must also decide the amount of money that will fairly compensate [plaintiff] for other proven damages caused by [defendant]'s communication, including, but not limited to:

- (1) harm to [plaintiff]'s reputation;
- (2) personal humiliation;
- (3) mental anguish and suffering; and
- (4) physical harm.

[Plaintiff] must prove by the greater weight of the evidence that [he][she] actually suffered these other damages and that [defendant]'s communication was a responsible cause of these other damages.

Comments

See Instruction No. 2715 cmt.

2731 Ill Will

In deciding whether [*defendant*] knew the communication was false or had serious doubts as to the truth of the communication, you may consider [*defendant*]'s attitude or ill will toward [*plaintiff*].

Comments

Ill will, including prior attempts to obtain false information, is not an element of the legal definition of actual malice. It is, however, relevant as evidence showing a state of mind highly susceptible to the entertainment of serious doubt concerning probable falsity. *Cochran v. Indianapolis Newspapers*, 175 Ind. App. 548, 372 N.E.2d 1211, 1220–21 (1978); *see also Indianapolis Newspapers, Inc. v. Fields*, 254 Ind. 219, 259 N.E.2d 651, 669 (1970); *State Farm Fire & Cas. Co. v. Radcliff*, 987 N.E.2d 121, 139 (Ind. Ct. App. 2013).

There is reason to think that evidence of ill will also may be admissible to prove actual malice. In *Indianapolis Newspapers*, 259 N.E.2d at 664, a sheriff sued a newspaper for publishing articles alleging brutality in jail. The trial court entered judgment for the sheriff. On appeal, then-Justice Givan recused. The remaining four justices split equally about whether to reverse or affirm the trial court. Pursuant to appellate rule, the trial court was affirmed. In his opinion to affirm, Justice DeBruler wrote, “Appellant’s argument is that ill will evidence is not *admissible* on the issue of whether appellant published with reckless disregard for the truth. We believe that it is relevant and admissible on that issue. It is true that ill will evidence does not tend to prove that appellant had *knowledge* of the falsity of its publications. However, actual malice may consist in a ‘high degree of awareness of their probable falsity.’ ” *Indianapolis Newspapers, Inc.*, 259 N.E.2d at 664 (quoting *Garrison v. Louisiana*, 379 U.S. 64 (1964)).

2733 Punitive Damages

[For reasons discussed in the Comments to this Instruction, the Committee recommends that judges use Instruction Nos. 737 to 745.]

Comments

The U.S. Supreme Court has required that a plaintiff prove actual malice (that defendant knew the communication was false or had serious doubts as to the truth of the communication) to recover punitive damages in a defamation case involving a matter of public concern. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Committee believes that this federal actual malice floor for punitive damages may be lower than the requirements for punitive damages set by Indiana case law and statutes, and thus refers attorneys and judges to Instruction Nos. 737 to 745.

A jury award of \$14.5 million in compensatory damages was not excessive or punitive when defendant destroyed plaintiffs' personal and professional world with defamatory statements that had longstanding consequences. *State Farm Fire & Cas. Co. v. Radcliff*, 987 N.E.2d 121, 155 (Ind. Ct. App. 2013).

2735 Truth as a Defense—(Not Applicable to Matters of Public Concern Involving Media Defendants)

Truth is a complete defense to a claim for [defamation][libel][slander]. [Defendant] has the burden to prove this defense. If [defendant] proves by the greater weight of the evidence that the statements were true, then you must decide in favor of [defendant].

Comments

Not all defamation is actionable; true statements never give rise to liability for defamation. *Branham v. Celadon Trucking Services, Inc.*, 744 N.E.2d 514 (Ind. Ct. App. 2001). Under the Indiana Code, in all actions for libel and slander the defendant may allege the truth of the statement that the plaintiff claims is defamatory. Ind. Code § 34-15-1-2.

This Instruction is not applicable to matters of public concern involving media defendants (Instruction Nos. 2715, 2717), because in those cases, the plaintiff is required to prove the falsity of the statement. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986) (“Here, we hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.”).

2737(A) Qualified Privilege—Question of Fact

Qualified privilege is a defense against a defamation action. Sometimes, people who make defamatory statements are not liable for those statements, because they were made under circumstances requiring full and unrestricted communication. This is called the defense of qualified privilege. [Defendant] has claimed this defense based on [insert particular privilege[s] claimed]

To establish this defense, (defendant) must prove by the greater weight of the evidence that:

- (1) (defendant) made the statement in good faith.
- (2) [insert additional elements of particular privilege[s] claimed].

The privilege does not apply if the defendant abuses the privilege. [Plaintiff] can still recover if [plaintiff] proves by the greater weight of the evidence that:

- (1) [defendant] was primarily motivated by ill will toward [plaintiff]; or
- (2) [defendant] caused excessive publication or communication of the statement; or
- (3) [defendant] made the statement without belief or grounds for belief in its truth.

2737(B) Qualified Privilege—Question of Law

Qualified privilege is a defense against a defamation action. [Defendant] has claimed this defense.

I have decided that [defendant] is protected by qualified privilege. The privilege does not apply if the defendant abuses the privilege.

Plaintiff can still recover, however, if [plaintiff] proves by the greater weight of the evidence that:

- (1) [defendant] was primarily motivated by ill will toward [plaintiff]; or
- (2) [defendant] caused excessive publication or communication of the statement;
or
- (3) [defendant] made the statement without belief or grounds for belief in its truth.

Comments

Qualified privilege was discussed in *Dugan v. Mittal Steel USA, Inc.*, 929 N.E.2d 184 (Ind. 2010) and *Ali v. Alliance Home Health Care*, 53 N.E.3d 420 (Ind. Ct. App. 2016).

In *Indianapolis Horse Patrol, Inc. v. Ward*, 247 Ind. 519, 217 N.E.2d 626 (1966), the Indiana Supreme Court held that where the doctrine of qualified privilege is applicable to the evidence presented in a case, it is error for the trial court to refuse to instruct the jury on it.

Indiana courts have recognized two distinct rationales for holding certain communications qualifiedly privileged. The first is the well-established common interest privilege that protects communication made in connection with membership qualifications, *Indianapolis Horse Patrol*, 217 N.E.2d 626; employment references, *Passmore v. Multi-Management Servs.*, 810 N.E.2d 1022 (Ind. 2004); intracompany communications, *Schrader v. Eli Lilly & Co.*, 639 N.E.2d 258, 261 (Ind. 1994), *Lawson v. Howmet Aluminum Corp.*, 449 N.E.2d 1172 (Ind. Ct. App. 1983); and the extension of credit, *Boydston v. Chrysler Credit Corp.*, 511 N.E.2d 318 (Ind. Ct. App. 1987). This privilege is intended to facilitate full and unrestricted communication on matters in which the parties have a common interest or duty.

In addition to the common interest privilege, Indiana courts have also recognized what section 598 of the Restatement 2d Torts (1977) calls a public interest privilege. To enhance public safety by facilitating the investigation of suspected criminal activity, communications to law enforcement officers are protected by this qualified privilege. *Holcomb v. Walter's Dimmick Petroleum, Inc.*, 858 N.E.2d 103 (Ind. 2006). "Accordingly, it is well established that in Indiana, communications made to law enforcement to report criminal activity are qualifiedly privileged. This so-called public interest privilege is intended to encourage private individuals to assist law enforcement with investigating and apprehending criminals." *Kelley v. Tanoos*, 865 N.E.2d 593, 600 (Ind. 2007).

In *State Farm Fire & Cas. Co. v. Radcliff*, 987 N.E.2d 121, 141 (Ind. Ct. App. 2013), plaintiff admitted probable cause for misdemeanor criminal mischief in a

diversion agreement. The Court of Appeals held that defendant could not claim the good faith qualified privilege because defendant's actions were coercive and overreaching. *State Farm*, 987 N.E.2d at 141.

Absent a factual dispute, whether a statement is protected by a qualified privilege is a question of law. *Lawson v. Howmet Aluminum Corp.*, 449 N.E.2d 1172, 1175 (Ind. Ct. App. 1983); *Bals v. Verduzco*, 600 N.E.2d 1353, 1356 (Ind. 1992). The trial court should determine, as a matter of law, whether the defendant and the audience shared a common interest or duty, or whether the public interest privilege applies. If the court determines that a common interest or duty exists, or the public interest privilege applies, this instruction should be read to the jury.

In *Indianapolis Horse Patrol*, the Indiana Supreme Court observed that when otherwise actionable words are spoken under a qualified privilege, the privilege serves to rebut the inference of malice that would otherwise arise as a matter of law by the speaking of the words. 217 N.E.2d at 629. However, the court also observed that the absence of malice is established only prima facie, and that the privilege may be overcome by proof of actual or express malice. *Indianapolis Horse Patrol*, 217 N.E.2d at 629.

Later cases have made clear that the word "malice" is a term of art in a case involving qualified privilege. *Patten v. Smith*, 172 Ind. App. 300, 360 N.E.2d 233, 238 (1977). In essence, malice is the speaker's abuse of the privileged occasion by going beyond the scope of the purposes for which the privilege exists. *Indiana Nat'l Bank v. Chapman*, 482 N.E.2d 474 (Ind. Ct. App. 1985); *Elliott v. Roach*, 409 N.E.2d 661 (Ind. Ct. App. 1980); *Puckett v. McKinney*, 175 Ind. App. 673, 373 N.E.2d 909 (1978); *Knight v. Baker*, 173 Ind. App. 314, 363 N.E.2d 1048 (1977); *Weenig v. Wood*, 169 Ind. App. 413, 349 N.E.2d 235 (1976).

2739 Slander of Title

Slander of title occurs when a person makes a malicious and false statement or claim concerning ownership of, or a security interest in, someone else's property that results in financial loss to the owner or interest holder. A malicious statement or claim is one made with knowledge of its falsity or with reckless disregard for whether it is false.

To recover damages for slander of title, [plaintiff] must prove by the greater weight of the evidence that:

- (1) [plaintiff] owned or had a security interest in property;
- (2) [defendant] made a false spoken or written statement concerning ownership or a security interest in the property;
- (3) [defendant] made the statement with knowledge of its falsity or with reckless disregard for whether it is false;
- (4) [plaintiff] was damaged as a result.

Comments

See Gintert v. Howard Publications, 565 F. Supp. 829 (N.D. Ind. 1983). The essence of a cause of action for slander of title is an unfounded claim made by one party concerning the ownership or security interest in property of another party, resulting in financial loss to the rightful owner. To recover, plaintiff must show that the statements were untrue and made maliciously, and that the plaintiff suffered a pecuniary loss as a result of the statements. *Tancos v. A.W., Inc.*, 502 N.E.2d 109 (Ind. Ct. App. 1986).

2741 Slander of Title—Damages

If you decide from the greater weight of the evidence that [*defendant*] is liable to [*plaintiff*] for slander of title, then you must decide the amount that will fairly compensate [*plaintiff*] for any reasonable monetary damages related to the slander of title.

Comments

Compensatory damages may include attorney fees and expenses incurred by a plaintiff in order to address the slander of title, however, attorney fees for bringing the action to recover damages for slander of title is not recoverable unless there is a statutory or contractual basis for the recovery of attorney fees. *Harper v. Goodin*, 409 N.E.2d 1129 (Ind. Ct. App. 1980).

Punitive damages may be awarded in a slander of title action. In order to recover punitive damages, actual malice must be proven. Malice is the publishing of matter that is known to be false, or published with a reckless disregard of whether the matter is true or false. Actual malice can be inferred by the trier from the evidence. See, *Harper v. Goodin*, 409 N.E.2d 1129 (Ind. Ct. App. 1980). See Instruction Nos. 737–745.

CHAPTER 2900

EMOTIONAL DISTRESS

SYNOPSIS

- 2901 Negligent Infliction of Emotional Distress—Elements
- 2903 Negligent Infliction of Emotional Distress—Bystander or Relative Bystander—Elements
- 2905 Intentional Infliction of Emotional Distress—Definition
- 2907 Intentional Infliction of Emotional Distress—Elements
- 2909 Extreme and Outrageous Conduct—Definition
- 2911 Emotional Distress Damages

2901 Negligent Infliction of Emotional Distress—Elements

To recover damages for negligent infliction of emotional distress, [plaintiff] must prove all of the following by the greater weight of the evidence:

- (1) [defendant] was negligent,
- (2) [plaintiff] was [directly involved in][impacted by] an incident related to [defendant]'s negligence [even if (plaintiff) was not physically injured],
- (3) [plaintiff] suffered serious emotional distress of the type that a reasonable person would expect to occur, and
- (4) [defendant]'s negligence was a responsible cause of [plaintiff]'s emotional distress.

Comments

For more than a century, Indiana law allowed emotional distress damages in negligence actions only when the distress was accompanied by and resulted from a physical injury caused by an impact to the person seeking recovery. *Smith v. Toney*, 862 N.E.2d 656, 658 (Ind. 2007). This requirement of both impact and physical injury is known as the traditional impact rule. *Smith*, 862 N.E.2d at 659. The rationale behind this rule was that absent physical injury, mental anguish was speculative, subject to exaggeration, likely to lead to fictitious claims, and often so unforeseeable that there was no rational basis for awarding damages. *Bader v. Johnson*, 732 N.E.2d 1212, 1221 (Ind. 2000).

In 1991, the Indiana Supreme Court concluded that the rationale for the traditional impact rule is no longer valid in some circumstances and adopted a modified impact rule that required impact but not physical injury. *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991). When a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma that is serious in nature and of a kind and extent normally expected to occur in a reasonable person, the plaintiff can recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff. *Shuamber*, 579 N.E.2d at 456.

The modified impact rule does not require that the tortfeasor initiate the impact; rather, the impact need only arise from the plaintiff's direct involvement in the tortfeasor's negligent conduct. *Bader*, 732 N.E.2d 1212 (mother's continued pregnancy after prenatal testing satisfied direct impact requirement of modified impact rule; thus mother could claim emotional distress damages against physician who performed testing for his failure to inform parents of abnormalities).

Thus, when the courts are satisfied that the alleged mental anguish was not likely speculative, exaggerated, fictitious, or unforeseeable, the claimant can proceed with an emotional distress claim for damages even though the physical impact was slight, or the evidence of physical impact was rather tenuous. *Bader*, 732 N.E.2d at 1221; *see also Conder v. Wood*, 716 N.E.2d 432 (Ind. 1999) (plaintiff's pounding on truck to get it to stop before the truck crushed her friend was an impact that arose from her direct involvement in defendant's negligent conduct, which satisfied the

modified impact rule); *Keim v. Potter*, 783 N.E.2d 731 (Ind. Ct. App. 2003) (patient's false diagnosis with hepatitis was direct involvement with the doctor's negligence, which satisfied the modified impact rule).

This bracketed language: "[even if (he)(she) was not physically injured]," should only be used in cases where the plaintiff was directly involved in, but not physically injured by, the impact. Judges should entertain arguments from counsel as to whether emotional damages are available in each particular type of case.

2903 Negligent Infliction of Emotional Distress—Bystander or Relative Bystander—Elements

To recover damages for negligent infliction of emotional distress, [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] was negligent,
- (2) [plaintiff][witnessed][came on the scene of] an incident caused by [defendant]'s negligence,
- (3) [plaintiff] suffered serious emotional distress of the type that a reasonable person would expect to occur, and
- (4) [defendant]'s negligence was a responsible cause of [plaintiff]'s emotional distress.

Comments

A bystander can recover damages for negligent infliction of emotional distress if he actually witnessed or came on the scene soon after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant's negligent or otherwise tortious conduct. *Groves v. Taylor*, 729 N.E.2d 569, 573 (Ind. 2000). This has been referred to as the "bystander" or "relative bystander" rule. *E.g.*, *Lachenman v. Stice*, 838 N.E.2d 451, 458 (Ind. Ct. App. 2005).

A fiancé is not analogous to a spouse. *Smith v. Toney*, 862 N.E.2d 656 (Ind. 2007).

In *Groves*, although the plaintiff did not suffer a direct impact, the plaintiff was directly involved. First, the injury suffered by the victim was fatal, satisfying the severity test; second, the plaintiff was the victim's sister, satisfying the relationship test; and third the plaintiff witnessed her brother's body as it rolled off the highway after being struck, satisfying the observation of a traumatic event test. 729 N.E.2d 569.

The requirement of bystander recovery is both temporal—at or immediately following the incident—and also circumstantial. The scene must be essentially as it was at the time of the incident. *Smith*, 862 N.E.2d 656.

In *Clifton v. McCammack*, 43 N.E.3d 213 (Ind. 2015), the Indiana Supreme Court declared *Groves* and *Smith* good law. The Court clarified that "the relationship and proximity determinations—i.e., what constitutes an analogous relationship and what satisfies 'soon after the death of a loved one'—are questions of law." *Id.* at 218. In *Clifton*, the plaintiff did not meet the circumstantial factors under the bystander test because both the scene and victim were significantly changed before plaintiff arrived at the accident, and plaintiff had also been informed of the incident indirectly before coming upon it. Plaintiff, therefore, was unable to recover emotional distress damages as a matter of law and summary judgment was appropriate. *Id.* at 223.

2905 Intentional Infliction of Emotional Distress—Definition

Intentional infliction of emotional distress occurs when a person, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another.

Comments

See *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1264 (Ind. Ct. App. 2002).

2907 Intentional Infliction of Emotional Distress—Elements

To recover damages for intentional infliction of emotional distress, [plaintiff] must prove all of the following by the greater weight of the evidence:

- (1) [defendant], by [his][her] extreme and outrageous conduct,
- (2) intentionally or recklessly
- (3) caused
- (4) severe emotional distress to [plaintiff].

Comments

See Branham v. Celadon Trucking Servs., 744 N.E.2d 514, 523 (Ind. Ct. App. 2001); *Powdertech, Inc. v. Joganic*, 776 N.E.2d 1251, 1264 (Ind. Ct. App. 2002).

Bradley v. Hall, 720 N.E.2d 747, 752 (Ind. Ct. App. 1999), states that the Restatement 2d Torts §§ 46 & 500 define recklessness in the context of intentional infliction of emotional distress in this manner:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Instruction Nos. 915 and 1115 discuss the concept of recklessness.

2909 Extreme and Outrageous Conduct—Definition

Conduct is extreme and outrageous when it goes beyond all possible bounds of decency, is atrocious, and is utterly intolerable in a civilized community.

Comments

Branham v. Celadon Trucking Servs., 744 N.E.2d 514, 523 (Ind. Ct. App. 2001);
Gable v. Curtis, 673 N.E.2d 805, 809 (Ind. Ct. App. 1996).

The tort of intentional infliction of emotional distress is defined as: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991) (quoting Restatement (Second) of Torts § 46 (1965)). The *Cullison* court explained that: "It is the intent to harm one emotionally that constitutes the basis for the tort of an intentional infliction of emotional distress." *Id.* Moreover, under Indiana law, conduct is extreme and outrageous:

only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" *Conwell v. Beatty*, 667 N.E.2d 768, 777 (Ind. Ct. App. 1996) (quoting Restatement (Second) of Torts § 46 (1965), reh'g denied).

Powdertech, Inc. v. Joganic, 776 N.E.2d 1251, 1264 (Ind. Ct. App. 2002).

2911 Emotional Distress Damages

emotional distress experienced by [_____];

Comments

This phrase can be inserted into the general elements of damage instruction, Instruction No. 703, when emotional distress damages are permitted by law, as discussed in these comments.

Emotional distress has also been referred to and includes mental anguish, emotional trauma, mental trauma, fright, and humiliation. *See, e.g., Atl. Coast Airlines v. Cook*, 857 N.E.2d 989, 991 (Ind. 2006) (mental anguish); *Cullison v. Medley*, 570 N.E.2d 27 (Ind. 1991) (trauma); *Harness v. Steele*, 159 Ind. 286, 64 N.E. 875 (1902) (humiliation and mortification); *Kline v. Kline*, 158 Ind. 602, 64 N.E. 9 (1902) (fright); *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N.E. 439 (1890) (indignity).

Recovery of money damages for emotional distress unaccompanied by a physical injury was limited in the past to certain kinds of intentional tort cases where intention to cause mental distress was shown or reasonably inferred, for example, assault, false imprisonment, false arrest, and trespass. *See Kline*, 64 N.E. at 10.

Next, Indiana law allowed emotional distress damages in negligence actions, but only when the distress was accompanied by and resulted from a physical injury caused by an impact to the person seeking recovery. *Smith v. Toney*, 862 N.E.2d 656, 658 (Ind. 2007). This requirement of both impact and physical injury is known as the traditional impact rule. *Smith*, 862 N.E.2d at 659. The rationale behind this rule was that absent physical injury, mental anguish was speculative, subject to exaggeration, likely to lead to fictitious claims, and often so unforeseeable that there was no rational basis for awarding damages. *Bader v. Johnson*, 732 N.E.2d 1212, 1221 (Ind. 2000).

In 1991, the Indiana Supreme Court concluded that the rationale for the traditional impact rule is no longer valid in some circumstances and adopted a modified impact rule that required impact but not physical injury. *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991). When a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma that is serious in nature and of a kind and extent normally expected to occur in a reasonable person, the plaintiff can recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff. *Shuamber*, 579 N.E.2d at 454.

The modified impact rule does not require that the tortfeasor initiate the impact; rather, the impact need only arise from the plaintiff's direct involvement in the tortfeasor's negligent conduct. *Bader*, 732 N.E.2d 1212 (mother's continued pregnancy following prenatal testing satisfied direct injury requirement of modified impact rule; thus mother could claim emotional distress damages against physician who performed testing for his failure to inform parents of abnormalities in ultrasound).

The Supreme Court also held that a bystander can recover damages for negligent infliction of emotional distress if he actually witnessed or came on the scene soon

after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant's negligent or otherwise tortious conduct. *Groves v. Taylor*, 729 N.E.2d 569, 573 (Ind. 2000). This has been referred to as the "bystander" or "relative bystander" rule.

In *Clifton v. McCammack*, 43 N.E.3d 213 (Ind. 2015), the Indiana Supreme Court held "the relationship and proximity determinations—i.e., what constitutes an analogous relationship and what satisfies 'soon after the death of a loved one'—are questions of law." *Id.* at 218. Accordingly, the jury may consider damages only after the Court has determined that the relationship and proximity requirements have been established.

The requirement of bystander recovery is both temporal—at or immediately following the incident—and also circumstantial. The scene must be essentially as it was at the time of the incident. *Smith*, 862 N.E.2d at 663.

When the courts are satisfied that the alleged mental anguish was not likely speculative, exaggerated, fictitious, or unforeseeable, the claimant can proceed with an emotional distress claim for damages even though the physical impact was slight, or the evidence of physical impact was rather tenuous. *Bader*, 732 N.E.2d at 1221.

Judges should entertain arguments from counsel as to whether emotional damages are available in each particular type of case.

CHAPTER 3100

INTENTIONAL TORTS

SYNOPSIS

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Introduction

The instructions in this chapter may be subject to traditional common law negligence principles (if, for example, they involve suits against the government), or comparative fault. While Indiana's comparative fault statute applies to intentional torts, Ind. Code §§ 34-51-2-1; 34-6-2-45(b), the statute has been interpreted to allow a reduction in the award for an intentional tort *only* when the plaintiff has failed to mitigate damages. *Becker v. Fisher*, 852 N.E.2d 46, 48 (Ind. Ct. App. 2006) (citing *Coffman v. Rohrman*, 811 N.E.2d 868, 872-73 (Ind. Ct. App. 2004)).

It is unclear to what extent proximate (responsible) cause is required in intentional tort cases. "One area in which it may be especially likely that the 'foreseeability' limitation will be cast aside is that of intentional torts, as to which it has been said often enough that there is more extended liability." Prosser, *Law of Torts* (4th Ed. 1971), § 43 at p. 263. Without more guidance on how far to "extend" liability, the Committee has continued to use language from its previous intentional torts instructions ("[plaintiff] was damaged as a result").

A. Fraud/Constructive Fraud

3101 Issues for Trial; Burden of Proof

The Plaintiff, _____, sued _____, the Defendant.

[Plaintiff] claims that [defendant][insert claimed action(s)]. [Plaintiff] must prove [his][her][its] claims by the greater weight of the evidence.

[Defendant] denies [plaintiff]'s claims. [Defendant] is not required to disprove [plaintiff]'s claims.

[Defendant] has claimed certain defenses. [Defendant] must prove [his][her][its] defense[s] of [specify affirmative defense(s)] by the greater weight of the evidence.

[(Plaintiff) also claims (he)(she)(it) is entitled to an award of punitive damages because (insert brief statement of claim for punitive damages). (Plaintiff) must prove this claim by clear and convincing evidence.]

Comments

This instruction should be modified to set forth all claims, counterclaims, and cross claims.

Jury Rule 20 and Trial Rule 51(A) require that the trial court give preliminary instructions as to the issues for trial and the burden of proof. The trial court and counsel should carefully prepare a preliminary instruction setting out the issues for trial in narrative form, including all claims, counterclaims, and cross claims. The instruction should be brief, accurate, conversational, and as non-technical as possible.

If a pretrial order has been entered, *see* T.R. 16(J), the Committee recommends that the instruction be drafted based on that order, which supplants the allegations in the pleadings, but should not be rigidly or pointlessly applied. *See Vlach v. Goode*, 515 N.E.2d 569, 570 (Ind. Ct. App. 1987); 62 Am. Jur. 2d PreTrial Conference § 29 at 661 (1972).

Whether a pretrial order has been entered or not, the Committee recommends against reading the pleadings to the jury.

3103 Fraud—Definition

Fraud is an act, course of action, omission, or concealment by which a person cheats or deceives another person.

“Omission” means leaving out.

“Concealment” means hiding.

Comments

Fraud is any act, omission, or concealment that involves breach of a duty causing damage as a result. *Brown v. Indiana Nat'l Bank*, 476 N.E.2d 888, 891 (Ind. Ct. App. 1985); *see also Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054, 1058 (Ind. 1992) (“The essential elements of actionable fraud are representations, falsity, scienter, deception and injury.”); *Biberstine v. New York Blower Co.*, 625 N.E.2d 1308, 1315–16 (Ind. Ct. App. 1993) (Actual fraud requires 1) a material misrepresentation of past or existing fact, 2) made with knowledge or reckless disregard of its falsity, 3) which caused reliance to the detriment of the person relying upon it. Constructive fraud requires 1) a duty existing by virtue of the relationship between the parties, 2) representations or omissions made in violation of that duty, 3) reliance thereon by the complaining party, 4) injury to the complaining party as a proximate result thereof, and 5) the gaining of an advantage by the party to be charged at the expense of the complaining party.); *Hinds v. McNair*, 413 N.E.2d 586, 603 (Ind. Ct. App. 1980).

3105 Fraud—Elements—Burden of Proof

To recover damages for fraud, [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] made false statement[s] of material past or existing fact[s];
- (2) [defendant] knew the statement[s] were false, or made them recklessly without knowing whether they were true or false;
- (3) [defendant] made the statement[s] to cause [plaintiff] to act upon it/[them];
- (4) [plaintiff] justifiably or reasonably relied and acted upon the statement[s]; and
- (5) [plaintiff] was damaged as a result.

Comments

This instruction can be modified if the fraud alleged involves something other than statements (i.e., act, omission, concealment).

The elements of actual fraud are: (1) a material misrepresentation of past or existing facts; (2) that was false, (3) and was made with knowledge or reckless ignorance of its falsity, (4) that caused reliance to the detriment of the person relying upon it. *Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054, 1058 (Ind. 1992); *Jarvis Drilling v. Midwest Oil Producing Co.*, 626 N.E.2d 821, 825 (Ind. Ct. App. 1993).

This instruction should be given with Instruction Nos. 3107 and 3109.

3107 Fraud—Promise of Future Events

Fraud cannot be based on unfulfilled promises or on statements concerning future events.

Comments

Actionable fraud arises from the false representation of past or existing facts, not from representations as to future action or future conduct, and cannot be based on broken promises, unfulfilled predictions, opinions, or statements of existing intent that are not executed. *Biberstine v. New York Blower Co.*, 625 N.E.2d 1308, 1315 (Ind. Ct. App. 1993) (The law in this jurisdiction is well-settled that actual fraud may not be based on representations regarding future conduct, or on broken promises, unfulfilled predictions or statements of existing intent which are not executed.); *Captain & Co. v. Stenberg*, 505 N.E.2d 88, 96 (Ind. Ct. App. 1987); *Kopis v. Savage*, 498 N.E.2d 1266, 1272 (Ind. Ct. App. 1986) ([Fraud] cannot be based on broken promises, unfulfilled predictions, or statements of existing intent which are not executed.).

3109 Fraud—Reliance

[Plaintiff] must use reasonable care in guarding against fraud.

Reasonable care means being careful and using good judgment and common sense.

Comments

Reliance is composed of two distinct elements: (1) the fact of reliance (meaning the plaintiff actually relied), and (2) the right of reliance (meaning the plaintiff was justified or reasonable in relying on the defendant's representations). *Biberstine v. New York Blower Co.*, 625 N.E.2d 1308, 1316 (Ind. Ct. App. 1993) (The law is designed to protect the weak and credulous from the wiles and stratagems of the artful and cunning. However, where persons stand mentally on equal footing and in no fiduciary relation, the law will not protect one who fails to exercise common sense and judgment.); *Block v. Lake Mortg. Co.*, 601 N.E.2d 449, 451 (Ind. Ct. App. 1992); *Plymale v. Upright*, 419 N.E.2d 756, 761 (Ind. Ct. App. 1981) (The right of reliance is more difficult to determine for the reason it is tightly bound up with the duty of a representee to be diligent in safeguarding his interests. The legal obligation that a person exercise the common sense and judgment of which he is possessed is a practical limitation on the actionability of various representations.).

A plaintiff must use ordinary care and diligence in guarding against fraud. *Soft Water Utilities, Inc. v. LeFevre*, 308 N.E.2d 395, 398 (1974), *questioned on other grounds by Bymaster v. Bankers Nat'l Life Ins. Co.*, 480 N.E.2d 273, 279 (Ind. Ct. App. 1985). The requirement of reasonable prudence in business transactions is not, however, carried to the extent that the law will ignore an intentional fraud practiced upon the unwary. *Grissom v. Moran*, 290 N.E.2d 119, 124 (1972) (A purchaser may rely on statements of fact made by the seller where such statements are not obviously false and where the facts are peculiarly within the knowledge of the seller.).

See Clark v. Simbeck, 895 N.E.2d 315, 319 (Ind. Ct. App. 2008) (" 'the statute has been interpreted to allow a reduction in the award for an intentional tort only when the plaintiff has failed to mitigate damages.' In the case of intentional torts, the Comparative Fault Act 'does not affect a defendant's liability but operates to decrease the amount of damages a plaintiff recovers if he has not appropriately mitigated his damages.' ") (citations omitted).

See Instruction No. 935 for failure to mitigate.

3111 Constructive Fraud—Definition and Elements—Burden of Proof

[Defendant] was obligated to deal fairly with [plaintiff][if][because] a [special][fiduciary] relationship existed between them. To recover damages for constructive fraud, [plaintiff] must prove by the greater weight of the evidence that:

- (1) A [special][fiduciary] relationship existed between [defendant] and [plaintiff];
- (2) [defendant] violated the obligation to deal fairly by misrepresenting material past or present facts or by remaining silent when [he][she] had an obligation to speak;
- (3) [plaintiff] justifiably relied on [defendant]'s representations or silence;
- (4) [defendant] gained an advantage at the expense of [plaintiff]; and
- (5) [plaintiff] was damaged as a result.

To recover damages from [defendant], [plaintiff] does not need to prove that [defendant] was dishonest or intended to deceive [plaintiff].

Comments

The elements of this pattern instruction were adapted from *Mullen v. Cogdell*, 643 N.E.2d 390, 401 (Ind. Ct. App. 1994). This instruction should be given with Instruction Nos. 3107 and 3109. The substance of the second element may need to be modified if the circumstances of the particular case involve acts or conduct on the defendant's part rather than silence or representations.

A duty in a constructive fraud case exists only where there is a fiduciary or other special relationship between the parties. *E.g.*, *Wells v. Stone City Bank*, 691 N.E.2d 1246, 1251 (Ind. Ct. App. 1998). Unlike actual fraud, intent to deceive is not an element of constructive fraud. *Sanders v. Townsend*, 582 N.E.2d 355, 358 (Ind. 1991).

A fact is material (important) if the fact omitted or misstated, if truly stated, might reasonably influence the party's decision regarding whether to enter into the transaction. *Curtis v. American Community Mut. Ins. Co.*, 610 N.E.2d 871, 873-74 (Ind. Ct. App. 1993).

Fraud may not be based upon representations regarding future conduct, or on broken promises, unfulfilled predictions, or matters of opinion. *Kopis v. Savage*, 498 N.E.2d 1266, 1272 (Ind. Ct. App. 1986) ([Fraud] cannot be based on broken promises, unfulfilled predictions, or statements of existing intent which are not executed.); *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 320 (Ind. Ct. App. 1991). Representations as to value cannot ordinarily constitute fraud, because they are generally referred to as mere expressions of opinion or "traders talk" involving a matter of judgment as to which men may differ. *Wisconics Engineering, Inc. v. Fisher*, 466 N.E.2d 745, 756 (Ind. Ct. App. 1984).

Generally the representation must not be in respect of facts that are equally open to the observations of both parties, and concerning which the complaining party, had they exercised reasonable diligence, could have attained correct knowledge. *Pugh's IGA, Inc. v. Super Food Services, Inc.*, 531 N.E.2d 1194 (Ind. Ct. App. 1988).

Where a party blindly trusts, and closes his or her eyes, the party is willingly deceived, and the maxim applies that one who consents cannot receive injury. *Pugh's IGA*, 531 N.E.2d 1194, 1198-99. A party will be charged with whatever knowledge could have been acquired by the use of ordinary diligence. *Barnd v. Borst*, 431 N.E.2d 161, 166 (Ind. Ct. App. 1982); *Plymale v. Upright*, 419 N.E.2d 756, 761 (Ind. Ct. App. 1981).

B. False Imprisonment/False Arrest**3113 False Imprisonment—False Arrest—Definition**

False [imprisonment][arrest] is the unlawful restraint of a person's freedom of movement or liberty without that person's consent.

Comments

False imprisonment consists of an unlawful restraint on one's freedom of movement against his will. *Radcliff v. County of Harrison*, 627 N.E.2d 1305 (Ind. 1994); *see also Dietz v. Finlay Fine Jewelry Corp.*, 754 N.E.2d 958, 967 (Ind. Ct. App. 2001). Incarceration need not be shown; rather, proof that a person's freedom was in some manner restricted against his will is required. *Delk v. Board of Comm'rs*, 503 N.E.2d 436, 439 (Ind. Ct. App. 1987); *see also Brickman v. Robertson Bros. Dep't Store, Inc.*, 202 N.E.2d 583, 586 (1964).

In a false arrest case against a police officer, the plaintiff has the burden of proving the officer lacked good faith or reasonable cause to believe he was acting constitutionally. *Garrett v. Bloomington*, 478 N.E.2d 89 (Ind. Ct. App. 1985). The test of this standard is whether the officer believed in good faith that the arrest was made with probable cause and that such belief was reasonable. *Id.* at 94–95 (Ind. Ct. App. 1985). *See* Instruction No. 3115.

A county sheriff is not liable for false imprisonment for incarcerating a person in the county jail without a warrant or judicial order where circumstances made it impossible for the sheriff to carry out a prior emergency detention order to commit the person to a mental health facility, and the judge who issued the detention order orally advised the sheriff to retain custody of the person until the emergency detention order could be carried out. *Radcliff*, 627 N.E.2d 1305.

Under the Indiana Criminal Code, when an owner or agent of a store or movie theater has probable cause to believe a person has committed or is committing a theft on the premises, he may detain that person for a reasonable time not to exceed two hours or the arrival of a law enforcement officer, whichever occurs first, without incurring civil or criminal liability. *See* Ind. Code ch. 35-33-6 *et seq.* However, the defendant has the burden of proof that it acted with probable cause. IC 35-33-6-4.

The terms “false imprisonment” and “false arrest” are generally used synonymously to refer to unlawful detention, but false arrest is actually one type of false imprisonment. False arrest must be committed under an assumption of legal authority, whereas false imprisonment does not necessarily require such authority. *See* 35 C.J.S. False Imprisonment § 2; 32 Am. Jur. 2d False Imprisonment § 2.

3115 False Imprisonment or False Arrest by Law Enforcement Officer—Elements

To recover damages for false [imprisonment][arrest], [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] was a law enforcement officer;
- (2) [defendant] intentionally restrained [plaintiff]'s freedom of movement or liberty without [plaintiff]'s consent;
- (3) [defendant] did not act pursuant to [a warrant][a judicial order][statutory authority]; and
- (4) [plaintiff] was damaged as a result.

Comments

Ind. Code § 35-41-1-17 defines “law enforcement officer.”

Ind. Code § 35-33-1-1, titled “arrests by law enforcement officers and persons authorized to act as law enforcement officers,” details several circumstances in which a law enforcement officer is not liable for restraining the personal freedom of an individual.

In many areas of law, Indiana courts follow the Restatement (Second) of Torts, and so we believe that it provides useful guidance to our inquiry. The Restatement provides that the defendant must act “intending to confine the other or a third person within boundaries fixed by the actor.” Restatement (Second) Of Torts § 35. Similarly, where the defendant’s actions are unintentional, a claim may not lie for “merely transitory or otherwise harmless confinement.” *Id.* Here, we find it notable that the Restatement tracks the Shoplifting Detention Act’s requirement that a detention be “reasonable and last only for a reasonable time.” Ind. Code § 35-33-6-2(b)(1); *see also, Dietz*, 754 N.E.2d at 968 (noting that the Act creates a test of “reasonableness in manner and time”). *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 941 (7th Cir. 2003).

It is a general rule of law that a process or warrant not void on its face, issued by a tribunal having subject matter jurisdiction, protects the officer executing it (but not necessarily the person issuing it) from an action for false imprisonment. *Delk v. Board of Comm’rs*, 503 N.E.2d 436 (Ind. Ct. App. 1987). The officer is not required to look beyond the process or warrant to determine the validity or regularity of the proceeding on which it was founded. *Delk*, 503 N.E.2d 436. *See also, Leshore v. State*, 755 N.E.2d 164 (Ind. 2001).

The party claiming false arrest must prove the absence of good faith or probable cause. *Garrett v. Bloomington*, 478 N.E.2d 89, 94–95 (Ind. Ct. App. 1985).

Where an officer has lawfully arrested a person, the officer may detain him for a time reasonably necessary to bring the arrestee before a magistrate or to obtain a warrant. *Gomez v. Adams*, 462 N.E.2d 212, 222 (Ind. Ct. App. 1984).

In an action for false imprisonment, where the plaintiff is seized pursuant to a body attachment or warrant, and the plaintiff is not the person named in the attachment

or warrant, the affirmative defense of good faith shields the arresting officer from liability, if the officer exercised reasonable diligence and care in ascertaining identity before serving the warrant. *Delk*, 503 N.E.2d 436, 439; *see also Barnes v. Wilson*, 450 N.E.2d 1030 (Ind. Ct. App. 1983).

A county sheriff is not liable for false imprisonment for incarcerating a person in the county jail without a warrant or judicial order where circumstances made it impossible for the sheriff to carry out a prior emergency detention order to commit the person to a mental health facility, and the judge who issued the detention order orally advised the sheriff to retain custody of the person until the emergency detention order could be carried out. *Radcliff v. County of Harrison*, 627 N.E.2d 1305 (Ind. 1994).

3117 Liability of Employer for Intentional Torts Committed by Employee

An employer is liable for the wrongful act of its employee done within the scope of [his][her] employment if the act is a responsible cause of the injury to the Plaintiff.

An employee's wrongful act is within the scope of employment when the employee's wrongful act occurred while the employee was performing activities expressly or impliedly authorized by the employer.

The wrongful act need not be intended to serve the employer, nor be authorized by the employer for it to fall within the scope of employment. The wrongful act must come from a course of conduct the employee performs while in the employer's service.

Comments

The determination of whether an employee is acting within the scope of his employment is dependent upon the circumstances of each case and is generally a question of fact for the jury. *Gomez v. Adams*, 462 N.E.2d 212, 223 (Ind. Ct. App. 1984); *Gibbs v. Miller*, 283 N.E.2d 592 (Ind. Ct. App. 1972).

Indiana does not require a plaintiff to prove that an employee's negligent or wrongful act was done with a purpose to serve the employer. Other jurisdictions do require a plaintiff to prove this purpose to serve the master/employer as an element. See *State v. Schallock*, 189 Ariz. 250, 258, 941 P.2d 1275, 1283 (1997); *Iandiorio v. Kriss & Senko Enterprises, Inc.*, 512 Pa. 392, 397-98, 517 A.2d 530, 533 (1986); *Sheldon v. Kettering Health Network*, 2015-Ohio-3268, ¶¶ 14-15, 40 N.E.3d 661, 668-69 (2d. Dist.).

The committee amended vicarious liability instructions in response to *Cox v. Evansville Police Dep't.*, 107 N.E.3d 453 (Ind. 2018):

To be clear, the focus in determining the scope of employment “must be on how the employment relates to the context in which the commission of the wrongful act arose.” *Barnett*, 889 N.E.2d at 285. (quoting *Stropes*, 547 N.E.2d at 249). When tortious acts are so closely associated with the employment that they arise naturally or predictably from the activities an employee was hired or authorized to do, they are within the scope of employment, making the employer liable. *West*, 81 N.E.3d at 1072-73. But tortious acts are not within the scope of employment when they flow from a course of conduct that is independent of activities that serve the employer. *Barnett*, 889 N.E.2d at 283-84.

Cox, 107 N.E.3d at 461.

The court in *Cox* also recognized the special case of a police officer misusing employer conferred power and authority in finding a city liable if the conduct arose naturally or predictably from the officer's employment activities. The reasoning of the court was as follows:

The reason underlying scope-of-employment liability support this conclusion. First, the city benefits from the lawful exercise of police power, so when tortious abuse of that power naturally or predictably flows from employment activities, the city equitably bears the cost of the victim's loss. See *West*, 81 N.E.3d at 1072-73. And second, holding the city liable encourages it to

guard against recurrent assaults. Particularly because cities vest considerable power and authority in police officers, we want cities to exercise vigilance in hiring and supervising officers. See *Waymire*, 114 F.3d at 649.

So the scope-of-employment rule, shaped by its underlying policies, allows employer liability for an officer's sexual assault. We stress that the unique authority that cities vest in police officers drives this conclusion.

Cox, 107 N.E.3d at 463.

The following instruction was affirmed in *Walgreen Co. v. Hinchey*, 21 N.E.3d 99 (Ind. Ct. App. 2014):

An employer is liable for the wrongful acts of its employee which are committed within the scope of employment.

An act is within the scope of employment if it is incidental to the employee's job duties, that is to say, the employee's wrongful act originated in activities closely associated with her job.

In deciding whether an employee's wrongful act was incidental to her job duties or originated in activities closely associated with her job, you may consider:

1. Whether the wrongful act was of the same general nature as her authorized job duties;
2. Whether the wrongful act is intermingled with authorized job duties; and
3. Whether the employment provided the opportunity or the means by which to commit the wrongful act.

Id. at 110–111. The definition of “incidental” included in the instruction was derived from *Celebration Fireworks*, 727 N.E.2d at 453; *Wilson v. Isaacs*, 917 N.E.2d 1251 (Ind. Ct. App. 2009), *vacated in part by* 929 N.E.2d 200 (Ind. 2010); *Ellis v. City of Martinsville*, 940 N.E.2d 1197 (Ind. Ct. App. 2011); *Smith v. Ind. Dep't of Corr.*, 871 N.E.2d 975, 986 (Ind. Ct. App. 2007). *Walgreen Co.*, 21 N.E.3d at 110–11. Other cases have included a factor that considers whether the act was done to further the employer's business. *Bushong v. Williamson*, 790 N.E.2d 467, 473 (Ind. 2003). However, the approved instruction did not include whether the act was “to further his employer's business.”

For instructions concerning agency and related issues, see Series 3500.

3119 Arrest by Citizen—Elements

To recover damages for false [imprisonment][arrest], [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] restrained [plaintiff]'s freedom of movement or liberty without [plaintiff]'s consent; and
- (2) [plaintiff] was damaged as a result.

[However, (defendant) is not liable if (he)(she) proves by the greater weight of the evidence that (he)(she) acted with legal authority.]

Comments

It is well recognized in Indiana that a private citizen has the right to arrest a person who has committed a felony in the private citizen's presence, and may even arrest one the citizen reasonably believes to have committed a felony, so long as the felony was in fact committed. *Surratt v. Petrol, Inc.*, 312 N.E.2d 487, 492-93 (1974). A citizen who makes an arrest does so at the citizen's peril, and must establish both the commission of the felony and the guilt of the person arrested. *Grand R. & I. R. Co. v. King*, 83 N.E. 778 (1908).

It is not error to instruct the jury that the fact that the plaintiff was imprisoned was sufficient to raise the presumption that the imprisonment was illegal, and that the burden of establishing the contrary was upon defendants. *Grand R. & I. R. Co.*, 83 N.E. at 780 (citing *Black v. Marsh*, 67 N.E. 201 (1903)).

Ind. Code § 35-33-1-4 provides the procedures and requirements for a citizen's arrest.

Detailing one's own version of facts to a police officer, leaving the officer to determine the appropriate response, is not an arrest, so long as the representation of the facts does not prevent the intelligent exercise of the officer's discretion. *Conn v. Paul Harris Stores, Inc.*, 439 N.E.2d 195, 198-99 (Ind. Ct. App. 1982).

A store owner or agent may also be immune from liability for detaining a suspected shoplifter. See Instruction No. 3113; Ind. Code § 35-33-6-4; *Lazarus Dep't Store v. Sutherlin*, 544 N.E.2d 513 (Ind. Ct. App. 1989).

3121 Emotional Distress Damages

emotional distress experienced by [_____];

Comments

This phrase can be inserted into the general elements of damage instruction, Instruction No. 703, when emotional distress damages are permitted by law, as discussed in these comments.

Emotional distress has also been referred to and includes mental anguish, emotional trauma, mental trauma, fright, and humiliation. *See, e.g., Atl. Coast Airlines v. Cook*, 857 N.E.2d 989, 991 (Ind. 2006) (mental anguish); *Cullison v. Medley*, 570 N.E.2d 27 (Ind. 1991) (trauma); *Harness v. Steele*, 64 N.E. 875 (Ind. 1902) (humiliation and mortification); *Kline v. Kline*, 64 N.E. 9 (Ind. 1902) (fright); *Pennsylvania Co. v. Bray*, 25 N.E. 439 (Ind. 1890) (indignity).

Recovery of money damages for emotional distress unaccompanied by a physical injury was limited in the past to certain kinds of intentional tort cases where intention to cause mental distress was shown or reasonably inferred, for example, assault, false imprisonment, false arrest, and trespass. *See Kline*, 64 N.E. at 10.

Next, Indiana law allowed emotional distress damages in negligence actions, but only when the distress was accompanied by and resulted from a physical injury caused by an impact to the person seeking recovery. *Smith v. Toney*, 862 N.E.2d 656, 658 (Ind. 2007). This requirement of both impact and physical injury is known as the traditional impact rule. *Smith*, 862 N.E.2d at 659. The rationale behind this rule was that absent physical injury, mental anguish was speculative, subject to exaggeration, likely to lead to fictitious claims, and often so unforeseeable that there was no rational basis for awarding damages. *Bader v. Johnson*, 732 N.E.2d 1212, 1221 (Ind. 2000).

In 1991, the Indiana Supreme Court concluded that the rationale for the traditional impact rule is no longer valid in some circumstances and adopted a modified impact rule that required impact but not physical injury. *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991). When a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma that is serious in nature and of a kind and extent normally expected to occur in a reasonable person, the plaintiff can recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff. *Shuamber*, 579 N.E.2d at 454.

The modified impact rule does not require that the tortfeasor initiate the impact; rather, the impact need only arise from the plaintiff's direct involvement in the tortfeasor's negligent conduct. *Bader*, 732 N.E.2d 1212 (mother's continued pregnancy following prenatal testing satisfied direct injury requirement of modified impact rule; thus mother could claim emotional distress damages against physician who performed testing for his failure to inform parents of abnormalities in ultrasound).

The Supreme Court also held that a bystander can recover damages for negligent infliction of emotional distress if he actually witnessed or came on the scene soon

after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant's negligent or otherwise tortious conduct. *Groves v. Taylor*, 729 N.E.2d 569, 573 (Ind. 2000). This has been referred to as the "bystander" or "relative bystander" rule.

In *Clifton v. McCammack*, 43 N.E.3d 213 (Ind. 2015), the Indiana Supreme Court held "the relationship and proximity determinations—i.e., what constitutes an analogous relationship and what satisfies 'soon after the death of a loved one'—are questions of law." *Id.* at 218. Accordingly, the jury may consider damages only after the Court has determined that the relationship and proximity requirements have been established.

The requirement of bystander recovery is both temporal—at or immediately following the incident—and also circumstantial. The scene must be essentially as it was at the time of the incident. *Smith*, 862 N.E.2d at 663.

When the courts are satisfied that the alleged mental anguish was not likely speculative, exaggerated, fictitious, or unforeseeable, the claimant can proceed with an emotional distress claim for damages even though the physical impact was slight, or the evidence of physical impact was rather tenuous. *Bader*, 732 N.E.2d at 1221.

Judges should entertain arguments from counsel as to whether emotional damages are available in each particular type of case.

C. Unfair Competition/Interference with Contractual or Business Relationship**3123 Unfair Competition—Definition**

Unfair competition includes [passing off, or attempting to pass off, one's goods and services as those of someone else][the interference with contract or business relationships][predatory price cutting].

Comments

Unfair competition has traditionally been defined as palming off one's goods, services, or business as that of another. *Hammons Mobile Homes, Inc. v. Laser Mobile Home Transport, Inc.*, 501 N.E.2d 458, 461 (Ind. Ct. App. 1986). The tort of unfair competition is premised upon the rationale that a person who has built up good will and reputation for his business is entitled to receive the benefits from his labors. *Id.* at 460–61. Unfair competition also encompasses actions for interference with business or contract relationships and predatory price cutting. *Bartholomew County Beverage Co. v. Barco Beverage Corp.*, 524 N.E.2d 353 (Ind. Ct. App. 1988). Unfair competition generally involves some type or form of intentional interference with a business relationship. *Marsym Dev. Corp. v. Winchester Economic Dev. Comm'n*, 447 N.E.2d 1138 (Ind. Ct. App. 1983).

3125 Unfair Competition—Passing Off—Elements—Burden of Proof

To recover damages for unfair competition, [the plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant][passed off][attempted to pass off][plaintiff]'s [goods][business][services] as [that][those] of [defendant],
- (2) [defendant]'s conduct had the natural and probable tendency to deceive the public, and
- (3) [plaintiff] was damaged as a result.

Comments

The instruction will require modification if the action is based on one competitor intentionally palming off goods, services, or business as that of another. *Hammons Mobile Homes, Inc. v. Laser Mobile Home Transport, Inc.*, 501 N.E.2d 458 (Ind. Ct. App. 1986); see also *Felsher v. University of Evansville*, 755 N.E.2d 589, 598 (Ind. 2001); *Keaton & Keaton v. Keaton*, 842 N.E.2d 816, (Ind. 2006).

3127 Unfair Competition—Predatory Pricing; Relevant Cost Standard

Predatory pricing is pricing below an appropriate measure of cost intended to eliminate competitors in the short run and reduce competition in the long run. Predatory pricing does not include price cutting that is merely aimed at increasing market share.

You must determine the relevant cost standard for the average or marginal cost of the product to establish whether predatory pricing has occurred.

To determine the relevant cost standard, you must consider:

- (1) the market share of the product in the relevant market;
- (2) the market share of the product controlled by [*defendant*];
- (3) [*defendant*]'s ability to exclude competitors from the market;
- (4) the appropriate measure of costs for [*defendant*]'s product; and
- (5) other relevant market information.

Comments

This instruction is based on *Bartholomew County Beverage Co. v. Barco Beverage Corp.*, 524 N.E.2d 353, 359 (Ind. Ct. App. 1988) (quoting but not ruling upon predatory pricing instruction); *see also Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117–18, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986) (predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run; it is a practice that harms both competitors and competition).

3129 Unfair Competition Based on Predatory Pricing—Elements—Burden of Proof

To recover damages for unfair competition based on predatory pricing, [plaintiff] must prove by the greater weight of the evidence that:

- (1) [plaintiff] had a property interest in [a license][a franchise][a contract][goods or services];
- (2) [plaintiff] had a valid potential of a business relationship but for [defendant]'s interference by predatory pricing;
- (3) [defendant] cut the price(s) of its [products][goods or services] below an appropriate measure of cost;
- (4) the price cutting was for the sole purpose of causing economic injury to [plaintiff];
- (5) no justification existed for the price cutting; and
- (6) [plaintiff] was damaged as a result.

Comments

This instruction is based on *Bartholomew County Beverage Co. v. Barco Beverage Corp.*, 524 N.E.2d 353, 359 (Ind. Ct. App. 1988) (quoting but not ruling upon predatory pricing instruction).

3131 Wrongful Interference with Contractual Relations—Elements—Burden of Proof

To recover damages for wrongful interference with contractual relations, [plaintiff] must prove by the greater weight of the evidence that:

- (1) a valid and enforceable contract existed between [plaintiff] and [name of third party];
- (2) [defendant] knew the contract existed;
- (3) [defendant] intentionally caused a breach of the contract;
- (4) no justification existed for [defendant]'s conduct; and
- (5) [plaintiff] was damaged as a result.

Comments

The elements of the tort of interference with a contractual relationship are: (1) existence of a valid and enforceable contract, (2) knowledge of the contract, (3) intentional inducement of a breach of the contract, (4) absence of justification, and (5) damages as a result of the defendant's wrongful inducement of a breach of the contract. *Melton v. Ousley*, 925 N.E.2d 430, 440 (Ind. Ct. App. 2010); *Bilimoria Computer Sys., LLC v. Am. Online, Inc.*, 829 N.E.2d 150, 156 (Ind. Ct. App. 2005); *Coleman v. Vukovich*, 825 N.E.2d 397, 403 (Ind. Ct. App. 2005); *Levee v. Beeching*, 729 N.E.2d 215, 221 (Ind. Ct. App. 2000).

An action for tortious interference with a contract cannot be maintained where there is no enforceable contract in existence. *Keating v. Burton*, 617 N.E.2d 588, 593 (Ind. Ct. App. 1993); *Johnson v. Hickman*, 507 N.E.2d 1014, 1017 (Ind. Ct. App. 1987).

This tort may arise in the context of a claim of unfair competition. *Bartholomew County Beverage Co. v. Barco Beverage Corp.*, 524 N.E.2d 353, 358 (Ind. Ct. App. 1988). In *Bartholomew*, the defendant engaged in predatory pricing by cutting prices below marginal cost with the intent to put the plaintiff out of business.

3132 Wrongful Interference with an Employment Relationship—Elements—Burden of Proof

To recover damages for wrongful interference with an employment relationship, [plaintiff] must prove by the greater weight of the evidence that:

- (1) an employment relationship existed between [plaintiff] and [name of third party];
- (2) [defendant] knew of the employment relationship;
- (3) [defendant] intentionally interfered with the employment relationship;
- (4) no justification existed for [defendant]'s conduct; and
- (5) [plaintiff] was damaged as a result.

Comments

See *Duty v. Boys & Girls Club of Porter County*, 23 N.E.3d 768, 774 (Ind. Ct. App. 2014), *Guinn v. Applied Composites Eng'g, Inc.*, 994 N.E.2d 1256, 1267 (Ind. Ct. App. 2013).

3133 Wrongful Interference with a Business Relationship—Elements—Burden of Proof

To recover damages for wrongful interference with a business relationship, [plaintiff] must prove by the greater weight of the evidence that:

- (1) a business relationship existed between [plaintiff] and [name of third party];
- (2) [defendant] knew of the business relationship;
- (3) [defendant] intentionally interfered with the business relationship;
- (4) no justification existed for [defendant]'s conduct;
- (5) [defendant] acted illegally in achieving [defendant]'s end; and
- (6) [plaintiff] was damaged as a result.

Comments

To prove tortious interference with a business relationship, a plaintiff must show that the defendant acted illegally in achieving his end. *Melton v. Ousley*, 925 N.E.2d 430, 440 n.9 (Ind. Ct. App. 2010); *Rice v. Hulsey*, 829 N.E.2d 87, 91 (Ind. Ct. App. 2005); see also *Levee v. Beeching*, 729 N.E.2d 215, 222–223 (Ind. Ct. App. 2000) (defamation does not constitute illegal conduct). This tort requires some independent, illegal action. *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 796 N.E.2d 286, 294 (Ind. 2003); *Geiger & Peters, Inc. v. Berghoff*, 854 N.E.2d 842, 853 (Ind. Ct. App. 2006).

There is, however, no definition or test for the “illegal conduct” element of tortious interference with a business relationship. *Levee*, 729 N.E.2d 215.

The theory of tortious interference with a business relationship does not require the existence of a valid contract. *Johnson v. Hickman*, 507 N.E.2d 1014, 1019 (Ind. Ct. App. 1987); *Willsey v. Peoples Federal Sav. & Loan Ass’n*, 529 N.E.2d 1199 (Ind. Ct. App. 1988).

3135 Factors Used in Determining Absence of Justification

For [defendant]'s conduct to be justified, it must have been done for a legitimate reason and not solely to injure and damage [plaintiff]. The overriding question is whether [defendant]'s conduct was fair and reasonable under the circumstances.

In determining whether [defendant]'s conduct was justified, you may consider:

- (1) [defendant]'s conduct;
- (2) [defendant]'s motive;
- (3) [plaintiff]'s interest that was affected;
- (4) the interest [defendant] tried to advance;
- (5) the public interest in protecting [defendant]'s freedom of action;
- (6) the public interest in protecting [plaintiff]'s [contractual][business][employment] relationship;
- (7) the proximity or remoteness of [defendant]'s conduct to the interference; and
- (8) the relations between the parties.

Comments

These factors are adapted from the Restatement 2d of Torts. *Melton v. Ousley*, 925 N.E.2d 430, 440–41 (Ind. Ct. App. 2010). The weight to be given each factor listed in the instruction may differ from case to case, but the overriding question is whether the defendant's conduct has been fair and reasonable under the circumstances. *Levee v. Beeching*, 729 N.E.2d 215, 221 (Ind. Ct. App. 2000).

In *Am. Consulting, Inc. v. Hannum Wagle & Cline Eng'g, Inc.*, 136 N.E.3d 208, 214–15 (Ind. 2019) the Supreme Court declined to decide how the absence of justification element must be proven:

In this case, the parties disagree about how the absence of justification element must be proven. The Defendants argue that in order to prove absence of justification, the defendant must act intentionally and without a legitimate business purpose and that "the breach is malicious and exclusively directed to the injury and damage of another." *Morgan Asset Holding Corp. v. CoBank, ACB*, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000) (citation omitted). ASI argues that the appropriate standard is whether the conduct at issue is fair and reasonable and believes application of the Restatement factors is appropriate. See *Coca-Cola Co. v. Babyback's Int'l, Inc.*, 806 N.E.2d 37, 49–52 (Ind. Ct. App. 2004), *vacated on other grounds by Coca-Cola v. Babyback's Int'l, Inc.*, 841 N.E.2d 557, 560 (Ind. 2006) (outlining the five Restatement elements for tortious interference with a business relationship). In the opinion below, our Court of Appeals acknowledged the differing approaches and found that the Restatement factors have consistently been applied to tortious interference cases. It found analyzing these factors would necessarily include analysis of both whether defendant acted maliciously and without a legitimate business purpose and whether defendant acted fairly and reasonably under the circumstances.

We find that no matter which of the two standards for what constitutes the absence of justification element for tortious interference with a contractual relationship is applied to the facts of this case, there remains an issue of material fact so as to preclude summary judgment. As our Court of Appeals majority aptly noted, there is both evidence that HWC has a legitimate business purpose in recruiting ASI employees and also evidence that HWC targeted ASI for an improper purpose. In light of this conflicting evidence and because of our summary judgment standard, we find the trial court properly denied summary judgment on ASI's claims of tortious interference.

To be unjustified, the actions must be "malicious and exclusively directed to the injury and damage of another." *Morgan Asset Holding Corp. v. CoBank*, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000); *Coleman v. Vukovich*, 825 N.E.2d 397, 404 (Ind. Ct. App. 2005).

The absence of justification is established only if the interferer acted intentionally, without a legitimate business purpose, and the breach is malicious and exclusively directed to the injury and damage of another. *Bilimoria Computer Sys., LLC v. Am. Online, Inc.*, 829 N.E.2d 150, 156-57 (Ind. Ct. App. 2005); see also *Winkler v. V.G. Reed & Sons, Inc.*, 619 N.E.2d 597, 600 (Ind. Ct. App. 1993), summarily *aff'd* & elaborated upon in 638 N.E.2d 1228 (Ind. 1994). The Committee felt that the term "malicious" was redundant in view of the balance of the instruction. See Restatement 2d Torts § 767.

3136 Civil Conspiracy—Elements—Burden of Proof

To recover damages for civil conspiracy against [defendant 2], [plaintiff] must establish by the greater weight of the evidence:

1. [defendant 1] committed a wrongful act;
2. [defendant 2] acted together with [defendant 1];
3. to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means; and,
4. [plaintiff] was damaged as a result.

Comments

Birge v. Town of Linden, 57 N.E.3d 839, 845–46 (Ind. Ct. App. 2016). *K.M.K. v A.K.*, 908 N.E.2d 658, 663–64 (Ind. Ct. App. 2009).

In Indiana, there is no separate civil cause of action for conspiracy. *Sims v. Beamer*, 757 N.E.2d 1021, 1026 (Ind. Ct. App. 2001). It must be alleged with an underlying tort. *Crystal Valley Sales, Inc. v. Anderson*, 22 N.E.3d 646, 653 (Ind. Ct. App. 2014), *trans. denied*. However, there is a civil cause of action for damages resulting from a conspiracy. *Id.* Allegations of civil conspiracy sound in tort. *Allen v. Great Am. Reserve Ins. Co.*, 766 N.E.2d 1157, 1168 (Ind. 2002). “Unlike criminal conspiracy, ‘[t]he gist of a civil conspiracy is not the unlawful agreement, but the damage resulting from that agreement.’ ” *Id.* (quoting 16 AM. JUR.2d, *Conspiracy*, § 53 at 279 (1998)). In other words, allegations of a civil conspiracy are just another way of asserting a concerted action in the commission of a tort. *Boyle v. Anderson Fire Fighters Asso, Local 1262*, 497 N.E.2d 1073, 1079 (Ind. Ct. App. 1986).

D. Assault/Battery**3137 Assault—Definition**

An assault occurs when:

- (1) One person performs an act with the intent to cause:
 - (a) harmful or offensive contact with [another person][a third person], or
 - (b) the fear that harmful or offensive contact is about to occur, and
- (2) The act of the first person has caused the other person to have a reasonable fear that the contact is about to occur.

Comments

The tort action of assault protects the right to be free from the fear of a battery. *Cullison v. Medley*, 570 N.E.2d 27, 30 (Ind. 1991). This instruction is based on the Restatement 2d Torts § 21, which is cited in *Cullison v. Medley*, 570 N.E.2d 27, 30 (Ind. 1991), which is in turn cited in *Rivera v. City of Nappanee*, 704 N.E.2d 131, 133 (Ind. Ct. App. 1998). The Restatement uses the words “imminent apprehension of contact.” The Committee believes that the language was intended to convey apprehension of imminent contact. The Committee therefore selected words that reflect that an apprehension that the contact is imminent. *Accord Fields v. Cummins Employees Fed. Credit Union*, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989) (“Battery is defined as ‘[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent . . .’”) (emphasis added) (quoting W. Keeton, Prosser & Keeton on the Law of Tort, § 9 (5th ed. 1984)), *overruled in part on other grounds by Wine-Settergren v. Lamey*, 716 N.E.2d 381 (Ind. 1999).

The committee also added the word “reasonable” to the language of the Restatement, due to the statement in *Rivera* that discusses a trauma that is “of a kind and extent normally expected to occur in a reasonable person.” *Rivera*, 704 N.E.2d at 133 (in the negligent infliction of emotional distress context) (quoting *Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991)).

In the Indiana Criminal Code, “assault and battery” has been replaced by the offense of battery. *See* Ind. Code § 35-42-2-1. The Indiana Criminal Law Study Commission comments to the battery statute note that there is no crime of assault in the Criminal Code because the Code has a general attempt crime. Ind. Code § 35-42-2-1 cmt.

As a civil matter, an assault, as distinguished from an assault and battery, has long been recognized as involving a willful and distinct invasion of the plaintiff’s right of personal security by “an act of inchoate violence . . . a touching of the mind, if not of the body.” *Kline v. Kline*, 64 N.E. 9, 10 (Ind. 1902); *see also McGlone v. Hauger*, 104 N.E. 116 (Ind. Ct. App. 1914). One court has observed that the mere pointing of a gun may well be an assault so far as the common law of torts is concerned. *Jarman v. State*, 363 N.E.2d 1084, 1086 n.2 (Ind. Ct. App. 1977), *rev’d on other grounds*, 368 N.E.2d 1348 (Ind. 1977).

3139 Assault—Elements

To recover damages caused by assault, [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] acted with the intent to cause:
 - (a) harmful or offensive contact with [plaintiff][a third person], or
 - (b) [plaintiff]'s fear that harmful or offensive contact is about to occur, and
- (2) [defendant]'s act caused [plaintiff] to reasonably fear that the contact was about to occur.

Comments

The law assumes that at least nominal damages result from trespass on a person. *McGlone v. Hauger*, 104 N.E. 116, 120 (Ind. Ct. App. 1914); *see also, e.g., Singh v. Lyday*, 889 N.E.2d 342, 360–61 (Ind. Ct. App. 2008) (stating in dicta that wherever there is a wrong, there is a remedy to redress it); *Rust v. Schwiening*, 124 N.E. 878, 879 (Ind. Ct. App. 1919) (the law presumes that the victim of an assault was damaged). Only nominal damages are presumed; compensatory damages still require proof by a preponderance standard. *Raess v. Doescher*, 883 N.E.2d 790 (Ind. 2008). The Committee has, therefore, declined to include a damages element that is present in other intentional tort instructions (“[plaintiff] was damaged as a result”).

3141 Battery—Definition

A battery is the [reckless][knowing][intentional] unauthorized touching of a person in a rude, insolent, or angry manner.

Comments

A “battery” is the touching of a person in a rude and insolent manner against his will. *Franklin General Ins. Co. v. Hamilton*, 133 N.E.2d 93, 95 (Ind. Ct. App. 1956). Battery includes an assault. *McGlone v. Hauger*, 104 N.E. 116, 120 (Ind. Ct. App. 1914). Any touching by one person of the person or clothes of another is an assault and battery. *Burdine v. State*, 646 N.E.2d 696, 700–01 (Ind. Ct. App. 1995). To constitute a battery, the act must be willfully committed, but any touching, however slight, may constitute an assault and battery. *Cohen v. Peoples*, 220 N.E.2d 665, 667 (Ind. Ct. App. 1966).

A battery may also be recklessly committed where one acts in reckless disregard of the consequences, and the fact the person does not intend that the act shall result in an injury is immaterial. *Mercer v. Corbin*, 20 N.E. 132, 133 (Ind. 1889); *Reynolds v. Pierson*, 64 N.E. 484, 485 (Ind. Ct. App. 1902).

In a medical malpractice action, a physician’s failure to obtain informed consent rises to the level of battery only when the doctor completely fails to obtain consent. *Van Sice v. Sentany*, 595 N.E.2d 264, 267 (Ind. Ct. App. 1992).

3143 Battery—Elements

To recover damages for battery, [plaintiff] must prove by the greater weight of the evidence that [defendant] touched [plaintiff]:

- (1) [recklessly][knowingly][intentionally],
- (2) in a rude, insolent, or angry manner, and
- (3) without [plaintiff]'s authorization.

Comments

The law assumes that at least nominal damages result from trespass on a person. *McGlone v. Hauger*, 104 N.E. 116, 120 (Ind. Ct. App. 1914); *see also, e.g., Singh v. Lyday*, 889 N.E.2d 342 (Ind. Ct. App. 2008) (stating in dicta that wherever there is a wrong, there is a remedy to redress it); *Rust v. Schwiening*, 124 N.E. 878, 879 (Ind. Ct. App. 1919) (the law presumes that the victim of an assault was damaged). Only nominal damages are presumed; compensatory damages still require proof by a preponderance standard. *Raess v. Doescher*, 883 N.E.2d 790 (Ind. 2008). The Committee has, therefore, declined to include a damages element that is present in other intentional tort instructions (“[plaintiff] was damaged as a result”).

3145 Liability of Employer for Intentional Torts Committed by Employee

An employer is liable for the wrongful act of its employee done within the scope of [his][her] employment if the act is a responsible cause of the injury to the Plaintiff.

An employee's wrongful act is within the scope of employment when the employee's wrongful act occurred while the employee was performing activities expressly or impliedly authorized by the employer.

The wrongful act need not be intended to serve the employer, nor be authorized by the employer for it to fall within the scope of employment. The wrongful act must come from a course of conduct the employee performs while in the employer's service.

Comments

The determination of whether an employee is acting within the scope of his employment is dependent upon the circumstances of each case and is generally a question of fact for the jury. *Gomez v. Adams*, 462 N.E.2d 212, 223 (Ind. Ct. App. 1984); *Gibbs v. Miller*, 283 N.E.2d 592 (Ind. Ct. App. 1972).

Indiana does not require a plaintiff to prove that an employee's negligent or wrongful act was done with a purpose to serve the employer. Other jurisdictions do require a plaintiff to prove this purpose to serve the master/employer as an element. *See State v. Schallock*, 189 Ariz. 250, 258, 941 P.2d 1275, 1283 (1997); *Iandiorio v. Kriss & Senko Enterprises, Inc.*, 512 Pa. 392, 397-98, 517 A.2d 530, 533 (1986); *Sheldon v. Kettering Health Network*, 2015-Ohio-3268, ¶¶ 14-15, 40 N.E.3d 661, 668-69 (2d. Dist.).

The committee amended vicarious liability instructions in response to *Cox v. Evansville Police Dep't.*, 107 N.E.3d 453 (Ind. 2018):

To be clear, the focus in determining the scope of employment "must be on how the employment relates to the context in which the commission of the wrongful act arose." *Barnett*, 889 N.E.2d at 285 (quoting *Stropes*, 547 N.E.2d at 249). When tortious acts are so closely associated with the employment that they arise naturally or predictably from the activities an employee was hired or authorized to do, they are within the scope of employment, making the employer liable. *West*, 81 N.E.3d at 1072-73. But tortious acts are not within the scope of employment when they flow from a course of conduct that is independent of activities that serve the employer. *Barnett*, 889 N.E.2d at 283-84.

Cox, 107 N.E.3d at 461.

The court in *Cox* also recognized the special case of a police officer misusing employer conferred power and authority in finding a city liable if the conduct arose naturally or predictably from the officer's employment activities. The reasoning of the court was as follows:

The reason underlying scope-of-employment liability support this conclusion. First, the city benefits from the lawful exercise of police power, so when tortious abuse of that power naturally or predictably flows from employment activities, the city equitably bears the cost of the victim's loss. *See West*, 81 N.E.3d at 1072-73. And second, holding the city liable encourages it to

guard against recurrent assaults. Particularly because cities vest considerable power and authority in police officers, we want cities to exercise vigilance in hiring and supervising officers. See *Waymire*, 114 F.3d at 649.

So the scope-of-employment rule, shaped by its underlying policies, allows employer liability for an officer's sexual assault. We stress that the unique authority that cities vest in police officers drives this conclusion.

Cox, 107 N.E.3d at 463. Additionally, in *Burton v. Benner*, 140 N.E.3d 848 (Ind. 2020), the Indiana Supreme Court held that there was no genuine issue of material fact as to whether a police officer was acting clearly outside the scope of his employment when he was operating his police vehicle at the time he was involved in an auto accident. The officer's conduct was the same general nature was authorized by police policy; he was maintaining radio contact, conforming to the dress code and could suddenly be available for official duties. *Id.* at 853.

The following instruction was affirmed in *Walgreen Co. v. Hinchy*, 21 N.E.3d 99 (Ind. Ct. App. 2014):

An employer is liable for the wrongful acts of its employee which are committed within the scope of employment.

An act is within the scope of employment if it is incidental to the employee's job duties, that is to say, the employee's wrongful act originated in activities closely associated with her job.

In deciding whether an employee's wrongful act was incidental to her job duties or originated in activities closely associated with her job, you may consider:

1. Whether the wrongful act was of the same general nature as her authorized job duties;
2. Whether the wrongful act is intermingled with authorized job duties; and
3. Whether the employment provided the opportunity or the means by which to commit the wrongful act.

Id. at 110–111. The definition of “incidental” included in the instruction was derived from *Celebration Fireworks*, 727 N.E.2d at 453; *Wilson v. Isaacs*, 917 N.E.2d 1251 (Ind. Ct. App. 2009), *vacated in part by* 929 N.E.2d 200 (Ind. 2010); *Ellis v. City of Martinsville*, 940 N.E.2d 1197 (Ind. Ct. App. 2011); *Smith v. Ind. Dep't of Corr.*, 871 N.E.2d 975, 986 (Ind. Ct. App. 2007). *Walgreen Co.*, 21 N.E.3d at 110–11. Other cases have included a factor that considers whether the act was done to further the employer's business. *Bushong v. Williamson*, 790 N.E.2d 467, 473 (Ind. 2003). However, the approved instruction did not include whether the act was “to further his employer's business.”

For instructions concerning agency and related issues, see Series 3500.

3147 Self-Defense (Person)

It is an issue whether [*defendant*] acted in [self-defense][defense of another person].

A person is justified in using reasonable force against another person to protect [himself][herself][another person] from what [he][she] reasonably believes to be the imminent use of unlawful force.

A person is justified in using deadly force and does not have a duty to retreat, only if [he][she] reasonably believes that deadly force is necessary to prevent [serious bodily injury to (himself)(herself)(a third person)][the commission of a forcible felony].

However, a person may not use force if:

[(he)(she) is committing a crime]

[(he)(she) is escaping after the commission of a crime]

[(he)(she) provokes unlawful action by another person with intent to cause bodily injury to that person]

[(he)(she) has willingly entered into combat with another person or is the initial aggressor, unless (he)(she) withdraws from the encounter and communicates to the other person (his)(her) intent to withdraw, and the other person nevertheless continues or threatens to continue unlawful action].

[*Defendant*] has the burden of proving self-defense by the greater weight of the evidence.

Comments

In *Travis v. Hall*, 431 N.E.2d 519, 521 n.2 (Ind. Ct. App. 1982), the Court of Appeals stated in a footnote that the same standards for self-defense apply in civil and criminal cases. Thus, the committee has patterned its self-defense instructions after Indiana Pattern Jury Instructions (Criminal) Nos. 10.03, 10.05, 10.07, 10.08, 10.09, and 10.10.

In a case where the defendant is a citizen claiming self-defense to make an arrest or prevent an escape, or a law enforcement officer claiming the defense of making a lawful arrest as justification for a battery, the Committee recommends referencing Indiana Pattern Jury Instructions (Criminal) Nos. 10.11 and 10.12.

Ind. Code § 35-31.5-2-138 defines “forcible felony.” If applicable, the Committee recommends reading Indiana Pattern Jury Instructions (Criminal) No. 14.1780 defining this term.

Ind. Code § 35-31.5-2-85 defines “deadly force.” If applicable, the Committee recommends reading Indiana Pattern Jury Instructions (Criminal) No. 14.102 defining this term.

Ind. Code § 35-31.5-2-292 defines “serious bodily injury.” If applicable, the Committee recommends reading Indiana Pattern Jury Instructions (Criminal) No. 14.3620 defining this term.

Ind. Code § 35-31.5-2-29 defines “bodily injury.” If applicable, the Committee

recommends reading Indiana Pattern Jury Instructions (Criminal) No. 14.0420 defining this term.

Indiana cases appear to treat self-defense as an affirmative defense. *See, e.g., Snodgrass v. Baize*, 405 N.E.2d 48, 50 (Ind. Ct. App. 1980) (stating that a party alleged the "affirmative defense" of self defense); *see also Kutscheid v. State*, 592 N.E.2d 1235 (Ind. 1992); *Brown v. State*, 485 N.E.2d 108 (Ind. 1985) (in the criminal context).

3149 Self-Defense (Property)

It is an issue whether [*defendant*] acted in defense of [his][her] property other than a dwelling, curtilage, or occupied motor vehicle.

A person may use reasonable force, but not deadly force, against another person if [he][she] reasonably believes that the force is necessary to immediately prevent or terminate the other person's [trespass on][criminal interference with] property [lawfully in the defendant's possession][lawfully in possession of a member of the defendant's immediate family][belonging to a person whose property the defendant has authority to protect].

A person is justified in using deadly force, and does not have a duty to retreat, if the person reasonably believes that force is necessary to prevent serious bodily injury to the person or another person, or to prevent the commission of a forcible felony.

However, a person may not use force if:

[(he)(she) is committing a crime]

[(he)(she) is escaping after the commission of a crime]

[(he)(she) is escaping after the commission of a crime]

[(he)(she) provokes unlawful action by another person with intent to cause bodily injury to that person]

[(he)(she) has willingly entered into combat with another person or is the initial aggressor, unless (he)(she) withdraws from the encounter and communicates to the other person (his)(her) intent to withdraw, and the other person nevertheless continues or threatens to continue unlawful action].

[*Defendant*] has the burden of proving self-defense by the greater weight of the evidence.

Comments

In *Travis v. Hall*, 431 N.E.2d 519, 521 n.2 (Ind. Ct. App. 1982), the Court of Appeals stated in a footnote that the same standards for self-defense apply in civil and criminal cases. Thus, the committee has patterned its self-defense instructions after Indiana Pattern Jury Instructions (Criminal) Nos. 10.03, 10.05, 10.07, 10.08, 10.09, and 10.10.

In a case where the defendant is a citizen claiming self-defense to make an arrest or prevent an escape, or a law enforcement officer claiming the defense of making a lawful arrest as justification for a battery, the Committee recommends referencing Indiana Pattern Jury Instructions (Criminal) Nos. 10.11 and 10.12.

Ind. Code § 35-31.5-2-138 defines "forcible felony." If applicable, the Committee recommends reading Indiana Pattern Jury Instructions (Criminal) No. 14.1780 defining this term.

Ind. Code § 35-31.5-2-85 defines "deadly force." If applicable, the Committee recommends reading Indiana Pattern Jury Instructions (Criminal) No. 14.102 defining this term.

Ind. Code § 35-31.5-2-292 defines "serious bodily injury." If applicable, the Committee recommends reading Indiana Pattern Jury Instructions (Criminal) No. 14.3620 defining this term.

Ind. Code § 35-31.5-2-29 defines "bodily injury." If applicable, the Committee recommends reading Indiana Pattern Jury Instructions (Criminal) No. 14.0420 defining this term.

3151 Self-Defense of Dwelling, Curtilage, Occupied Motor Vehicle

It is an issue whether [*defendant*] acted in defense of [his][her][dwelling][curtilage][occupied motor vehicle].

A person may use reasonable force, including deadly force, against another person and does not have a duty to retreat if [he][she] reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry or attack on [his][her][dwelling][curtilage][occupied motor vehicle].

However, a person may not use force if:

[(he)(she) is committing a crime]

[(he)(she) is escaping after the commission of a crime]

[(he)(she) provokes unlawful action by another person with intent to cause bodily injury to that person]

[(he)(she) has willingly entered into combat with another person or is the initial aggressor, unless (he)(she) withdraws from the encounter and communicates to the other person (his)(her) intent to withdraw, and the other person nevertheless continues or threatens to continue unlawful action].

[*Defendant*] has the burden of proving self-defense by the greater weight of the evidence.

Comments

In *Travis v. Hall*, 431 N.E.2d 519, 521 n.2 (Ind. Ct. App. 1982), the Court of Appeals stated in a footnote that the same standards for self-defense apply in civil and criminal cases. Thus, the committee has patterned its self-defense instructions after Indiana Pattern Jury Instructions (Criminal) Nos. 10.03, 10.05, 10.07, 10.08, 10.09, and 10.10.

In a case where the defendant is a citizen claiming self-defense to make an arrest or prevent an escape, or a law enforcement officer claiming the defense of making a lawful arrest as justification for a battery, the Committee recommends referencing Indiana Pattern Jury Instructions (Criminal) Nos. 10.11 and 10.12.

Ind. Code § 35-31.5-2-138 defines "forcible felony." If applicable, the Committee recommends reading Indiana Pattern Jury Instructions (Criminal) No. 14.1780 defining this term.

Ind. Code § 35-31.5-2-85 defines "deadly force." If applicable, the Committee recommends reading Indiana Pattern Jury Instructions (Criminal) No. 14.102 defining this term.

Ind. Code § 35-31.5-2-292 defines "serious bodily injury." If applicable, the Committee recommends reading Indiana Pattern Jury Instructions (Criminal) No. 14.3620 defining this term.

Ind. Code § 35-31.5-2-29 defines "bodily injury." If applicable, the Committee recommends reading Indiana Pattern Jury Instructions (Criminal) No. 14.0420 defining this term.

3153 Curtilage—Definition

“Curtilage” means land (including buildings on that land) adjoining a dwelling and used for family and domestic purposes. The curtilage does not need to be fenced or enclosed.

When you decide whether an area or building is within the “curtilage,” consider how close it is to the dwelling and whether it is used for family and domestic purposes.

Comments

Fox v. State, 384 N.E.2d 1159, 1163 (Ind. Ct. App. 1979), defines “curtilage” as “the space of ground adjoining the dwelling house used in connection therewith in the conduct of family affairs and for carrying on domestic purposes.” *Fox* also states that proximity to the dwelling and the use in connection with family purposes should be considered in determining whether property is part of the curtilage. *Fox*, 384 N.E.2d at 1163.

3155 Emotional Distress Damages

emotional distress experienced by [_____];

Comments

This phrase can be inserted into the general elements of damage instruction, Instruction No. 703, when emotional distress damages are permitted by law, as discussed in these comments.

Emotional distress has also been referred to and includes mental anguish, emotional trauma, mental trauma, fright, and humiliation. *See, e.g., Atl. Coast Airlines v. Cook*, 857 N.E.2d 989, 991 (Ind. 2006) (mental anguish); *Cullison v. Medley*, 570 N.E.2d 27 (Ind. 1991) (trauma); *Harness v. Steele*, 64 N.E. 875 (Ind. 1902) (humiliation and mortification); *Kline v. Kline*, 64 N.E. 9 (Ind. 1902) (fright); *Pennsylvania Co. v. Bray*, 25 N.E. 439 (Ind. 1890) (indignity).

Recovery of money damages for emotional distress unaccompanied by a physical injury was limited in the past to certain kinds of intentional tort cases where intention to cause mental distress was shown or reasonably inferred, for example, assault, false imprisonment, false arrest, and trespass. *See Kline*, 64 N.E. at 10.

Next, Indiana law allowed emotional distress damages in negligence actions, but only when the distress was accompanied by and resulted from a physical injury caused by an impact to the person seeking recovery. *Smith v. Toney*, 862 N.E.2d 656, 658 (Ind. 2007). This requirement of both impact and physical injury is known as the traditional impact rule. *Smith*, 862 N.E.2d at 659. The rationale behind this rule was that absent physical injury, mental anguish was speculative, subject to exaggeration, likely to lead to fictitious claims, and often so unforeseeable that there was no rational basis for awarding damages. *Bader v. Johnson*, 732 N.E.2d 1212, 1221 (Ind. 2000).

In 1991, the Indiana Supreme Court concluded that the rationale for the traditional impact rule is no longer valid in some circumstances and adopted a modified impact rule that required impact but not physical injury. *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991). When a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma that is serious in nature and of a kind and extent normally expected to occur in a reasonable person, the plaintiff can recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff. *Shuamber*, 579 N.E.2d at 454.

The modified impact rule does not require that the tortfeasor initiate the impact; rather, the impact need only arise from the plaintiff's direct involvement in the tortfeasor's negligent conduct. *Bader*, 732 N.E.2d 1212 (mother's continued pregnancy following prenatal testing satisfied direct injury requirement of modified impact rule; thus mother could claim emotional distress damages against physician who performed testing for his failure to inform parents of abnormalities in ultrasound).

The Supreme Court also held that a bystander can recover damages for negligent infliction of emotional distress if he actually witnessed or came on the scene soon

after the death or severe injury of a loved one with a relationship to the plaintiff analogous to a spouse, parent, child, grandparent, grandchild, or sibling caused by the defendant's negligent or otherwise tortious conduct. *Groves v. Taylor*, 729 N.E.2d 569, 573 (Ind. 2000). This has been referred to as the "bystander" or "relative bystander" rule.

In *Clifton v. McCammack*, 43 N.E.3d 213 (Ind. 2015), the Indiana Supreme Court held "the relationship and proximity determinations—i.e., what constitutes an analogous relationship and what satisfies 'soon after the death of a loved one'—are questions of law." *Id.* at 218. Accordingly, the jury may consider damages only after the Court has determined that the relationship and proximity requirements have been established.

The requirement of bystander recovery is both temporal—at or immediately following the incident—and also circumstantial. The scene must be essentially as it was at the time of the incident. *Smith*, 862 N.E.2d at 663.

When the courts are satisfied that the alleged mental anguish was not likely speculative, exaggerated, fictitious, or unforeseeable, the claimant can proceed with an emotional distress claim for damages even though the physical impact was slight, or the evidence of physical impact was rather tenuous. *Bader*, 732 N.E.2d at 1221.

Judges should entertain arguments from counsel as to whether emotional damages are available in each particular type of case.

3156 Sporting Event Injuries—Co-Participants, Spectators, and/or Third Persons

A participant in [sport] must not intentionally or recklessly cause injury.

[Defendant]’s conduct is intentional if:

- (1) [Defendant] either intends to cause injury or believes injury is substantially certain to occur; and,
- (2) the intent to injure falls outside the range of ordinary activity in [sport] generally.

[Defendant]’s conduct is reckless if:

- (1) [Defendant] intentionally acts or intentionally fails to act;
- (2) [Defendant] is consciously indifferent to [plaintiff]’s safety; and,
- (3) [Defendant]’s conduct, including [his][her] state of mind, falls outside the range of ordinary activity in [sport] generally.

In determining intentional or reckless conduct, you may consider:

- (1) the nature of [sport];
- (2) the customs and practices of [sport][at the level being played][including the types of contact and the level of violence generally accepted]; and
- (3) the rules governing [sport].

Comments

This instruction only applies to injuries caused by a sports participant to another sports participant or spectator.

In *Pfenning v. Lineman*, the Indiana Supreme Court held that “in negligence claims against a participant in a sports activity, if the conduct of such participant is within the range of ordinary behavior of participants in the sport, the conduct is reasonable as a matter of law and does not constitute a breach of duty.” 947 N.E.2d 392, 404 (Ind. 2011) (golfer’s errant drive that resulted in plaintiff’s injury was “clearly within the range of ordinary behavior of golfers and thus is reasonable as a matter of law and does not establish the element of breach required for a negligence action”). After *Pfenning*, the analysis of an injury at a sports event is not based on the status of the *plaintiff* or her incurrence of risk, but on whether the conduct of the *defendant* is within the range of ordinary behavior of participants in the sport. If it is, the conduct is reasonable as a matter of law and there is no breach of duty.

The degree of physical contact allowed varies from sport to sport and even from one group of players to another. In *Allen v. Dover Co-Recreational Softball League*, 807 A.2d 1274, 1284 (N.H. 2002), cited in *Pfenning*, the New Hampshire Supreme Court noted “[r]isks that are outside the range of the ordinary activity involved in the sport” do not “reasonably flow from participation in the sport.” Therefore, to determine the appropriate standard of care to be applied to participants, sponsors and organizers of recreational athletics, it considered: (1) the nature of the sport

involved; (2) the type of contest, *i.e.*, amateur, high school, little league, pick-up, etc.; (3) the ages, physical characteristics, and skills of the participants; (4) the type of equipment involved; and (5) the rules, customs, and practices of the sport, including the types of contact and the level of violence generally accepted. *Allen*, 807 N.E.2d at 1285. The Indiana Court of Appeals has held that recognized rules of a sport are an indication of the standard of care players owe each other; while a violation of those rules may not be negligence *per se*, it may well be evidence of negligence. *Duke's GMC, Inc. v. Erskine*, 447 N.E.2d 1118, 1124 (Ind. Ct. App. 1983).

The *Pfenning* Court noted that strong public policy considerations favor the encouragement of participation in athletic activities and the discouragement of excessive litigation of claims by persons who suffer injuries from participants' conduct. These policy reasons support "affording enhanced protection against liability to co-participants in sports events." 947 N.E.2d at 403.

In *Pfenning* the Indiana supreme court dealt with the unfortunate circumstance of a teenage granddaughter invited to participate in a golfing tournament by her grandfather, as the driver of a beverage golf cart was struck in the mouth and jaw by a drive of one of the sports participants. The granddaughter sued (1) the golfer who hit the ball, (2) the Elks Club who owned the golf course (3) the tavern that sponsored the golf tournament, and (4) her grandfather who told her to drive a cart without a front windshield or roof. The Indiana Supreme Court established a new limited liability rule that in Indiana courts should not referee disputes when arising from ordinary sports activity. In *Pfenning*, the court held that when a sports participant injures someone while in engaging in conduct ordinary in the sport and without intent to injure or recklessness, the participant does not breach a duty. Judgment was granted by the trial court and affirmed by the Court of Appeals which found that the motion was properly granted in favor of the golfer and the Elks Club who owned the golf course. The ruling was reversed as to the tavern that sponsored the golf tournament. The Supreme Court said "our replacement formulation (finding no breach by an athlete engaged in this sports' ordinary activities) applies to conduct of sports participants, not promoters of sporting events (the tavern) and thus does not insulate Whitey's from potential liability". Because the grandfather was presumably working as an agent of the tavern when he provided his granddaughter with a windowless and roofless beverage cart which would allow a golf ball to strike her in the face, there was no summary judgment appropriate for the tavern. As to her grandfather, who was neither a participant nor owner of the real estate where the sport occurred, but rather was a grandfather providing a granddaughter a windowless and roofless beverage golf cart which created a genuine issue of material fact precluding summary judgment for the grandfather who had a duty to protect his granddaughter from risks.

In *Megenity v. Dunn*, 68 N.E.3d 1080 (Ind. 2017), the Indiana Supreme Court addressed a sports case where two participants in a karate demonstration where involved in an injury, when a karate class member jump-kicked instead of doing a less explosive kick and injured another player. The main holding of *Megenity* is that when you look to determine whether its ordinary behavior, you look at the sport generally not the specific activity within the sport. Because a jump-kick was ordinary activity when looking at the sport generally there was no duty or breach

of duty. However, the *Megenity* court repeated the holding of the court in *Pfenning*, see footnote 3 of *Pfenning*, 947 N.E.2d, page 404. That is, there still can be liability for which summary judgment should not apply if there are genuine issues of material fact presented by designated evidence of intentional or reckless infliction of injury. The *Megenity* court set out the elements to show intentional infliction of sports injury: (1) that the defendants sports participant must either desire to cause the consequences of his act or believe those consequences are substantially certain to result in second and until that intent to injure must fall “totally outside the range of ordinary activity involved in this sport” overall.

If a premises liability claim is allowed to go to the jury, refer to *Hoosier Mt. Bike Ass'n v. Kaler*, 73 N.E.3d 712 (Ind. Ct. App. 2017) which is a case that deals with premises liability claims while participating in sports activities. See the note in the comments to instruction 1932b, 1921 and 1915.

E. Malicious Prosecution/Abuse of Process

3157 Malicious Prosecution—Definition—Elements—Burden of Proof

Malicious prosecution is a [legal proceeding][criminal prosecution] started or continued maliciously.

To recover damages for malicious prosecution, [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant][started][caused to be started][continued][caused to be continued] a [legal proceeding][criminal prosecution] against [plaintiff];
- (2) [defendant] acted maliciously in doing so;
- (3) [defendant] acted without probable cause;
- (4) the [legal proceeding][criminal prosecution] ended in [plaintiff]'s favor; and
- (5) [plaintiff] was damaged as a result.

Comments

To be successful with a malicious prosecution action, the plaintiff must prove by a preponderance of the evidence that: (1) the defendant instituted or caused to be instituted a prosecution against the plaintiff; (2) the defendant acted maliciously in doing so (no probable cause existed to justify the institution of the prosecution), and ultimately, (3) the prosecution was terminated in the plaintiff's favor. *Crosson v. Berry*, 829 N.E.2d 184, 194 (Ind. Ct. App. 2005); *Mirka v. Fairfield of Am.*, 627 N.E.2d 449, 451 (Ind. Ct. App. 1994); *F.W. Woolworth Co. v. Anderson*, 471 N.E.2d 1249, 1253 (Ind. Ct. App. 1984); *see also Board of Comm'rs v. King*, 481 N.E.2d 1327, 1329 (Ind. Ct. App. 1985).

Proof of an absence of probable cause is essential to a successful suit for malicious prosecution. *Garrett v. Bloomington*, 478 N.E.2d 89, 93 (Ind. Ct. App. 1985); *Gomez v. Adams*, 462 N.E.2d 212, 222 (Ind. Ct. App. 1984). Moreover, a lack of probable cause cannot be based on the defendant's negligent failure to investigate thoroughly where some factual basis for bringing a claim exists. *Johnson County Rural Electric Membership Corp. v. Burnell*, 484 N.E.2d 989, 992–93 (Ind. Ct. App. 1985).

Probable cause to initiate a criminal case constitutes prima facie evidence that probable cause exists in a subsequent civil lawsuit alleging malicious prosecution; the plaintiff may rebut such a prima facie case by introducing evidence that the finding of probable cause was induced by false testimony, fraud, or other improper means, such as withholding material facts at the hearing. *Glass v. Trump Ind., Inc.*, 802 N.E.2d 461, 467 (Ind. Ct. App. 2004); *see also K Mart Corp. v. Brzezinski*, 540 N.E.2d 1276 (Ind. Ct. App. 1989); *Johnson County Rural Electric Membership Corp. v. Burnell*, 484 N.E.2d 989 (Ind. Ct. App. 1985); *Kroger Food Stores, Inc. v. Clark*, 598 N.E.2d 1084 (Ind. Ct. App. 1992).

In a malicious prosecution action, malice may be inferred from the failure to conduct a reasonable or suitable investigation, and from the existence of personal animosity. *F.W. Woolworth Co. v. Anderson*, 471 N.E.2d 1249, 1254 (Ind. Ct. App.

1984). *Mirka* disagrees with *F.W. Woolworth* to the extent it implies that failure to conduct a reasonable investigation (which is essentially negligence) can be considered evidence of malice. 627 N.E.2d 449 (Ind. Ct. App. 1994). "Any allegation that a defendant has failed to reasonably investigate, therefore, before it can be considered to be evidence of malice, must be linked to evidence that the failure was done with the required level of culpability—here malice. Standing alone a mere failure of this sort cannot allege the necessary intent." *Mirka*, 627 N.E.2d at 452 n.5.

3159 Probable Cause—Definition

A person has probable cause to act when [he][she] reasonably believes, based on information the person knows, that another person [has committed][is committing] a wrongful act.

Comments

Proof of an absence of probable cause is essential to a successful suit for malicious prosecution. *Garrett v. Bloomington*, 478 N.E.2d 89, 93 (Ind. Ct. App. 1985); *Gomez v. Adams*, 462 N.E.2d 212, 222 (Ind. Ct. App. 1984). Moreover, a lack of probable cause cannot be based on the defendant's negligent failure to investigate thoroughly where some factual basis for bringing a claim exists. *Johnson County Rural Electric Membership Corp. v. Burnell*, 484 N.E.2d 989, 992-93 (Ind. Ct. App. 1985).

Probable cause to initiate a criminal case constitutes prima facie evidence that probable cause exists in a subsequent civil lawsuit alleging malicious prosecution; the plaintiff may rebut such a prima facie case by introducing evidence that the finding of probable cause was induced by false testimony, fraud, or other improper means, such as withholding material facts at the hearing. *Glass v. Trump Ind., Inc.*, 802 N.E.2d 461, 467 (Ind. Ct. App. 2004); *see also K Mart Corp. v. Brzezinski*, 540 N.E.2d 1276 (Ind. Ct. App. 1989); *Johnson County Rural Electric Membership Corp. v. Burnell*, 484 N.E.2d 989 (Ind. Ct. App. 1985); *Kroger Food Stores, Inc. v. Clark*, 598 N.E.2d 1084 (Ind. Ct. App. 1992).

3161 Malicious Act—Definition

A malicious act is a wrongful act done willfully or on purpose, and without probable cause, that results in [injury][damage] to another.

Malice may be proven directly, or it may be inferred from a complete lack of probable cause or from a total failure to investigate.

Comments

In a malicious prosecution action, malice may be inferred from the failure to conduct a reasonable or suitable investigation, and from the existence of personal animosity. *F.W. Woolworth Co. v. Anderson*, 471 N.E.2d 1249, 1254 (Ind. Ct. App. 1984). *Mirka* disagrees with *F.W. Woolworth* to the extent it implies that failure to conduct a reasonable investigation (which is essentially negligence) can be considered evidence of malice. 627 N.E.2d 449 (Ind. Ct. App. 1994). “Any allegation that a defendant has failed to reasonably investigate, therefore, before it can be considered to be evidence of malice, must be linked to evidence that the failure was done with the required level of culpability—here malice. Standing alone a mere failure of this sort cannot allege the necessary intent.” *Mirka*, 627 N.E.2d at 452 n.5.

Malice can also be inferred from a total lack of probable cause. *Kroger Food Stores, Inc. v. Clark*, 598 N.E.2d 1084 (Ind. Ct. App. 1992); *Display Fixtures Co. v. R.L. Hatcher, Inc.*, 438 N.E.2d 26 (Ind. Ct. App. 1982).

3163 Defense—Advice of Counsel—Initiation of Civil Proceeding

[Defendant] defends [herself][himself] by claiming [she][he] filed [her][his] lawsuit on the advice of an attorney.

If you decide by the greater weight of the evidence that:

- (1) [defendant] consulted with a disinterested, competent attorney;
- (2) [defendant] fully and truthfully disclosed to that attorney all information that [defendant] knew or could have reasonably discovered; and
- (3) the attorney advised [defendant] to file the lawsuit;

then you must decide [defendant] was not at fault.

Comments

To rely on advice of counsel, a defendant must: (1) make a complete and truthful disclosure of all facts within the defendant's immediate knowledge, (2) disclose all facts that could have been ascertained by the exercise of due diligence, and (3) have consulted competent and disinterested counsel. *F.W. Woolworth Co. v. Anderson*, 471 N.E.2d 1249, 1255 (Ind. Ct. App. 1984); see also *Executive Builders, Inc. v. Trisler*, 741 N.E.2d 351, 356 (Ind. Ct. App. 2000).

3165 Abuse of Process—Definition—Elements—Burden of Proof

Abuse of process is the improper use of a legal procedure with an ulterior motive to achieve a result other than what the procedure was designed to accomplish.

To recover damages caused by abuse of process, [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] intentionally used a legal procedure that would not be proper in the normal course of the case;
- (2) [defendant] used the procedure with an ulterior motive to achieve a result it was not designed to accomplish; and
- (3) [plaintiff] was damaged as a result.

Comments

Abuse of process is the misuse or misapplication of process for an end other than that which it was designed to accomplish. *Watters v. Dinn*, 633 N.E.2d 280, 288 (Ind. Ct. App. 1994); *Display Fixtures Co. v. R.L. Hatcher, Inc.*, 438 N.E.2d 26, 31 (Ind. Ct. App. 1982); *Brown v. Robertson*, 92 N.E.2d 856, 857–58 (Ind. Ct. App. 1950).

The elements of abuse of process are: (1) the existence of an ulterior motive, and (2) using process in a way that was improper in the normal course of the case. *Comfax Corp. v. North Am. Van Lines*, 638 N.E.2d 476 (Ind. Ct. App. 1994). The test of an improper process is whether the legal steps were procedurally and substantively proper under the circumstances. *Reichhart v. City of New Haven*, 674 N.E.2d 27 (Ind. Ct. App. 1996).

In an action for abuse of process, the important factor is the purpose for which the process was used. Although abuse of process does not require proof that the action was brought without probable cause or that the action terminated in the plaintiff's favor, *Central Nat'l Bank v. Shoup*, 501 N.E.2d 1090, 1095 (Ind. Ct. App. 1986), the lack of probable cause may be used as evidence of misuse of process. *Display Fixtures Co.*, 438 N.E.2d 26.

The court may award attorney fees to the prevailing party if the claim or defense was frivolous, unreasonable, groundless, or initiated in bad faith. Ind. Code § 34-52-1-1. The award of attorney fees will not preclude a subsequent abuse of process suit, although the prevailing party may not recover the same attorney's fees twice. See *Kahn v. Cundiff*, 533 N.E.2d 164, 169 (Ind. Ct. App. 1989), adopted by 543 N.E.2d 627 (Ind. 1989).

The defense of advice of counsel is not available in abuse of process actions. *Lindsay v. Jenkins*, 574 N.E.2d 324, 327 (Ind. Ct. App. 1991).

F. Employment Law**3173 Employment Law—Employment At Will**

Employment at will is an employment relationship that has no definite length of time. Except for a few limited exceptions, an employment-at-will relationship may be terminated by the employer or employee at any time and for any reason, or for no reason at all.

Comments

Employment at will means “employment of no definite or ascertainable term, employment is presumptively terminable at any time by either party, with or without cause.” *Tony v. Elkhart County*, 918 N.E.2d 363, 367 (Ind. Ct. App. 2009). There are certain narrowly-drawn exceptions to the employment-at-will doctrine.

The first exception was established by the case of *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973). In *Frampton*, the Court held that a cause of action exists if an employee is discharged in retaliation for exercising his or her statutorily conferred right to seek worker’s compensation benefits. *Frampton*, 297 N.E.2d at 428. The Indiana Supreme Court has also recently held that a constructive retaliatory discharge claim falls within the ambit of this narrowly drawn public policy exception to the employment-at-will doctrine. *Baker v. Tremco Inc.*, 917 N.E.2d 650, 655 (Ind. 2009).

The second exception exists when an employer discharges an employee for refusing to commit an illegal act for which the employee could be personally liable. *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390, 392–93 (Ind. 1988). The Indiana Supreme Court held that “firing an employee for refusing to commit an illegal act for which he would be personally liable is as much a violation of public policy declared by the legislature as firing an employee for filing a workmen’s compensation claim.” *McClanahan*, 517 N.E.2d at 393.

Indiana has a “whistleblower” statute at Ind. Code § 22-5-3-3 and a “blacklisting” statute at Ind. Code § 22-5-3-1, which, while not exceptions to the employment at will doctrine, may be the source of claims for plaintiffs in the employment law context.

An employer can terminate an employee “for no reason at all.” However, this may cause an issue for an employer in a retaliation suit when the burden shifts to the employer to “articulate a legitimate, non-discriminatory reason for the discharge.” *Whirlpool Corp. v. Vanderburgh County-Evansville Human Relations Comm’n*, 875 N.E.2d 751, 758 (Ind. Ct. App. 2007).

3175 Exception to At Will Employment—Statutorily Conferred Right/Retaliatory Discharge

An exception to employment at will occurs when an employer fires an employee in retaliation for exercising a right made available by Indiana statute.

Indiana statute allows an employee to [file a claim for workers' compensation benefits][insert (other) statutorily conferred right(s) exercised by the employee]. The employer may not fire an employee for filing this type of claim.

Comments

Frampton v. Central Indiana Gas Co, 297 N.E.2d 425 (Ind. 1973), is the leading case on retaliatory discharge for the exercise of a statutorily conferred right (the filing of a workers' compensation claim).

For a discussion of retaliatory discharge for the filing of a discrimination claim, see *Whirlpool v. Vanderburgh County-City of Evansville Human Relations Comm'n*, 875 N.E.2d 751 (Ind. Ct. App. 2007).

3177 Exception to Employment At Will—Employee's Refusal to Commit an Illegal Act

An exception to employment at will occurs when an employer fires an employee in retaliation for refusing to commit an illegal act for which the employee could be personally liable.

An employer is prohibited from firing an employee for refusing to [set out the illegal act that the plaintiff refused to commit and for which plaintiff could be personally liable].

Comments

For cases involving retaliatory discharge of an employee for refusing to commit an illegal act, see *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390 (Ind. 1988); *Haas Carriage v. Berna*, 651 N.E.2d 284 (Ind. Ct. App. 1995); and *McGarrity v. Berlin Metals, Inc.*, 774 N.E.2d 71 (Ind. Ct. App. 2002).

Whistleblower statute cases can be distinguished from cases involving the employee's retaliatory discharge for refusing to commit an illegal act. In the latter, the employee's refusal to commit an illegal act is mandatory for the reason that an illegal act is prohibited. In whistleblower cases, "the employees' reports of their employers' illegal activities, while certainly advantageous if substantiated, were not mandatory under the law, unlike compliance with a state's penal code." *McClanahan v. Remington Freight Lines, Inc.* 517 N.E.2d 390, 393 (Ind. 1988).

3179 Retaliatory Discharge—Elements

To recover damages caused by retaliatory discharge from [defendant], [plaintiff] must prove each of the following by the greater weight of the evidence:

- (1) [defendant] employed [plaintiff];
- (2) [defendant] fired [plaintiff] because [plaintiff][filed a worker's compensation claim][set out the illegal act that the plaintiff refused to commit and for which plaintiff could be personally liable];
- (3) But for [plaintiff][filing a worker's compensation claim][set out the illegal act that the plaintiff refused to commit and for which plaintiff could be personally liable][defendant] would not have fired [plaintiff]; and,
- (4) [plaintiff] was damaged as a result.

Comments

Perkins v. Mem'l Hosp. of S. Bend, 121 N.E.3d 1089, 1092–1093 (Ind. Ct. App. 2019):

[O]ur Supreme Court has recognized only three exceptions to the employment-at-will doctrine: (1) where there is adequate independent consideration that supports an employment contract; (2) where public policy demands a deviation from the employment-at-will doctrine because (a) a clear statutory expression of a right or duty is contravened or (b) an employer discharges an employee for refusing to commit an illegal act for which the employee would be personally liable; and (3) where the doctrine of promissory estoppel applies. *Baker v. Tremco Inc.*, 917 N.E.2d 650, 653–54 (Ind. 2009).

See Instruction No. 3321 for an instruction on promissory estoppel.

The elements set forth in the instruction above are found at *Purdy v. Wright Tree Service*, 835 N.E.2d 209, 213 (Ind. Ct. App. 2005), and *Powdertech v. Joganic*, 776 N.E.2d 1251 (Ind. Ct. App. 2002).

“We have previously explained that the word ‘solely’ means only that any and all reasons for the discharge must be unlawful to sustain the claim for retaliatory discharge.” *Whirlpool Corp. v. Vanderburgh County*, 875 N.E.2d 751, 758 (Ind. Ct. App. 2007), citing *Purdy v. Wright Tree Serv.*, 835 N.E.2d 209, 212 (Ind. Ct. App. 2005).

3181 Constructive Discharge—Elements

To recover on this claim, [plaintiff] must prove by the greater weight of the evidence that:

1. [plaintiff] filed a claim under [(set out the statutorily conferred right)][set out the illegal act that the plaintiff refused to commit and for which plaintiff could be personally liable)];
2. because [plaintiff] filed a claim under [(set out the statutorily conferred right)][set out the illegal act that the plaintiff refused to commit and for which plaintiff could be personally liable)], [defendant] made [plaintiff]'s working conditions so unbearable that a reasonable person in [plaintiff]'s position would have quit;
3. as a result of [defendant]'s action, [plaintiff] quit; and,
4. [plaintiff] was damaged.

Comments

This instruction is taken from the federal pattern jury instruction on constructive discharge. However, the word “intolerable” is used in the federal instruction while the word “unbearable” is used in this instruction. *See Federal Civil Jury Instructions of the Seventh Circuit*, pp. 61, 2017 revised.

“A constructive discharge occurs when an employer purposefully creates working conditions [that] are so intolerable that an employee has no other option but to resign.” *Tony v. Elkhart County*, 918 N.E.2d 363, 368 (Ind. Ct. App. 2009), citing *Tony v. Elkhart County*, 851 N.E.2d 1032, 1037 (Ind. Ct. App. 2006) (quoting *Cripe, Inc. v. Clark*, 834 N.E.2d 731, 735 (Ind. Ct. App. 2005)).

In *Tony II*, the Indiana Court of Appeals looked to the *Federal Civil Jury Instructions of the Seventh Circuit* for guidance (in the context of federal employment discrimination claims) concerning constructive discharge for the reason that there was scant Indiana law on constructive discharge. *Tony II*, 918 N.E.2d at 369.

To establish a constructive discharge, working conditions must be even more egregious than the high standard for a hostile work environment because an employee ordinarily is expected to remain employed while seeking redress for the alleged discrimination or unfair treatment.

Tony II, citing *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1050 (7th Cir. 2000).

Additionally, it should be noted that, under certain facts, the objective “reasonable person” standard for constructive discharge may not be appropriate. For example, constructive discharge may take place where an employer “tak[es] advantage of a known idiosyncratic vulnerability of the employee . . . by altering the employee’s working conditions in order to make the employee’s life at work intolerable . . .” *Tony II*, 918 N.E.2d at 369, citing *Lindale v. Tokheim Corp.*, 145 F.3d 953, 955 (7th Cir. 1999). However, an “employee may not be unreasonably sensitive to his working environment.” *Tony II*, 918 N.E.2d at 369 (various federal citations).

omitted). This pattern instruction, then, may have to be customized, especially as regards the question of a subjective or objective test, depending upon the facts of the case.

Filing a worker's compensation claim is not required. Work environments that pose "grave threats to physical integrity" or pose an "unreasonable risk of physical harm" may also amount to constructive discharge according to the Second Circuit. *Tony II*, 918 N.E.2d at 369-70 (various federal citations omitted).

3182 Constructive Discharge—Medical Restriction

To recover on this claim, [plaintiff] must prove by the greater weight of the evidence that:

1. [plaintiff] filed a claim under [(set out the statutorily conferred right)][(set out the illegal act that the plaintiff refused to commit and for which plaintiff could be personally liable)];
2. [defendant] was aware that [plaintiff] had [set out medical restriction];
3. because [plaintiff] filed a claim under [(set out the statutorily conferred right)][(set out the illegal act that the plaintiff refused to commit and for which plaintiff could be personally liable)], [defendant] knowingly or with deliberate indifference ordered [plaintiff] to perform work duties in violation of the medical restriction;
4. putting [plaintiff] at risk of physical harm; and
5. as a result of [defendant]'s action, [plaintiff] quit.

Comments

In at-will employment relationships, Indiana recognizes retaliatory discharge in two instances:

1. Termination of an employee because the employee exercised a statutorily conferred benefit. *Frampton v. Central Indiana Gas Co.*, 297 N.E.2d 425 (Ind. 1973).
2. An employer discharges an employee refusing to commit an illegal act for which the employee may be personally liable. *McClanahan v. Remington Freight Lines, Inc.*, 517 N.E.2d 390 (Ind. 1988).

Constructive discharge was first applied to retaliatory discharge claims in the case of *Tony v. Elkhart County*, 851 N.E.2d 1032 (Ind. Ct. App. 2006) (*Tony I*), and again in *Tony v. Elkhart County*, 918 N.E.2d 363 (Ind. Ct. App. 2009) (*Tony II*). The *Tony* cases concerned whether an employer who has knowingly or with deliberate indifference ordered an employee to perform work duties that violate medical restrictions, putting the employee at risk of physical harm, can constitute a constructive discharge. *Id.* at 370. Unlike the employee in *Frampton*, who was discharged by the employer, in *Tony*, the employee terminated his employment alleging that the employer had purposely made working conditions so intolerable that the employee could no longer continue his employment. In both *Tony* cases, the Court of Appeals held that the doctrine of constructive discharge applied in retaliatory discharge cases.

Special attention should be paid to statements in *Tony II* that the reasonable person standard may not apply to medical restriction cases. *Id.* at 363.

3183 Constructive Discharge—Failure to Exhaust

To claim constructive discharge, [plaintiff] is not required to exhaust all of [defendant]'s official means of complaining about work conditions before [plaintiff] quit.

However, you may consider any failure to exhaust all official means of complaining about work conditions in determining whether a reasonable person would have found the conditions unbearable.

Comments

In a case where constructive discharge results from an employee's medical restrictions (Instruction No. 3182), caution should be used in giving this instruction. Special attention should be paid to statements in *Tony v. Elkhart County*, 918 N.E.2d 363 (Ind. Ct. App. 2009), that the reasonable person standard may not apply to medical restriction cases, but may apply when a failure to exhaust argument is raised. 918 N.E.2d at 369–70.

3184 Negligent Misrepresentation—Elements—Burden of Proof

To recover damages for negligent misrepresentation, [plaintiff] must prove by the greater weight of the evidence that:

1. [defendant] and [plaintiff] were in an employment relationship;
2. [defendant] supplied false information for guidance in [defendant]'s and [plaintiff]'s employment relationship;
3. [defendant] failed to exercise reasonable care or competence in obtaining or communicating the false information;
4. [plaintiff] justifiably relied on the false information;
5. [plaintiff] was damaged as a result.

Comments

Thomas v. Lewis Engineering, Inc., 848 N.E.2d 758, 760 (Ind. Ct. App. 2006); *Nicoll v. Cmty. State Bank*, 529 N.E.2d 386, 391 (Ind. Ct. App. 1988); Restatement (Second) of Torts § 552 (1977).

Thomas v. Lewis Engineering, Inc., 848 N.E.2d at 760, states:

Indiana has not adopted Restatement Section 552 without limitation. Indeed, the condition of Indiana law regarding the tort of negligent misrepresentation has been aptly described as one of “relative chaos.” *Tri-Professional Realty, Inc. v. Hillenburg*, 669 N.E.2d 1064, 1068 (Ind. Ct. App. 1996) (quoting *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 721 (7th Cir. 1994)), *trans. denied*.

See also, *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742 (Ind. 2010).

3185 Damages

If you decide from the greater weight of the evidence that [*defendant*] is liable to [*plaintiff*], then you must decide the amount of money that will fairly compensate [*plaintiff*].

In deciding the amount you award, if any, you may consider:

- (1) The income and benefits [*plaintiff*] has lost through today;
- (2) The income and benefits [*plaintiff*] is reasonably likely to lose in the future for a reasonable length of time; and
- (3) The mental anguish, emotional distress, and humiliation suffered by [*plaintiff*] as a result of the firing.

Comments

In order to fully compensate the injured employee, it is necessary that damages be assessed based upon a presumption of prospective employment, once the employee has proven his discharge was retaliatory. We will not assume that, had the retaliatory discharge not occurred, that the employer would have fired the employee for some other reason even though it would be within the employer's prerogative to do so.

If the employee is able to find comparable employment, damages may be recovered for the period in which he is unemployed; however, if he is unable to find comparable employment, as is the case here, the jury should consider the employee's evidence upon the difference between what he would have earned had he not been discharged, and what he actually did earn thereafter. We hasten to add that the fiction of prospective employment we use to gauge the wrongfully discharged employee's losses may not stretch on ad infinitum. Instead, we leave to the jury the task of determining what amount of time is a "reasonable time" after the employee's termination, noting only that such a reasonable time may not extend beyond the employee's death. Only in this way can the true injury to the employee be gauged, and the employee fully compensated for his loss.

Remington Freight Lines v. Larkey, 644 N.E.2d 931, 941-42 (Ind. Ct. App. 1994).

Damages for retaliatory discharge may include, if appropriate, "bodily injury and mental anguish." *Remington Freight Lines*, 644 N.E.2d at 941-42.

For calculations on future pay, see *Haas Carriage v. Berna*, 651 N.E.2d 284 (Ind. Ct. App. 1994).

Punitive damages may be recoverable under intentional and constitutional torts. For punitive damages instructions, see Instruction Nos. 737-745.

3187 Mitigation of Damages

A plaintiff must use reasonable care to minimize [his][her] damages after [he][she] is harmed.

You may consider failure to minimize damages to reduce the amount of damages that [plaintiff] claims.

[Defendant] has the burden of proving by the greater weight of the evidence that [plaintiff] failed to use reasonable care to minimize [his][her] damages.

Comments

We emphasize that this damage measure in no way relieves a wrongfully discharged employee from the responsibility to mitigate his damages by seeking comparable employment. Neither does it relieve a jury from taking into account the employee's subsequent earnings in calculating the appropriate compensatory damages. Instead, this measure should serve only as a guide for the determination of damages which will fully compensate the wrongfully discharged employee-at-will for the tort perpetrated upon him. Further, we recognize that the tort of retaliatory discharge generally, and this damage measure specifically, seems to place an employee-at-will in a better position than a contractually bound employee, who may only recover damages through the end of his contract. However, it is not our province to ignore the established common law of the State of Indiana. Instead, it is the province of the legislature to correct any inaccuracies it may perceive.

Remington Freight Lines v. Larkey, 644 N.E.2d 941, 942–43 (Ind. Ct. App. 1994).

While a plaintiff's post-accident conduct that constitutes an unreasonable failure to mitigate damages is not to be considered in the assessment of fault, a plaintiff still “‘may not recover for any item of damage that [the plaintiff] could have avoided through the use of reasonable care.’” *Kocher*, 824 N.E.2d at 675 (quoting former Indiana Pattern Jury Instruction No. 11.120 (2003)). “Put simply, a plaintiff in a negligence action has a duty to mitigate his or her post-injury damages, and the amount of damages a plaintiff is entitled to recover is reduced by those damages which reasonable care would have prevented.” *Buhring v. Tavoletti*, 905 N.E.2d 1059, 1064 (Ind. Ct. App. 2009) (citing *Willis*, 839 N.E.2d at 1187). In other words, a jury can reduce the plaintiff's final damages award based on the plaintiff's post-injury failure to mitigate damages.

Because the Committee contemplates that jurors will consider pre-injury failure to mitigate as fault, this instruction focuses on post-injury failure to mitigate, and should be given only when evidence of post-injury failure to mitigate is offered. See Instruction No. 935.

The defendant bears the burden of proving both elements of the affirmative defense of post-injury failure to mitigate damages: (1) that the plaintiff failed to exercise reasonable care to mitigate his or her post-injury damages, and (2) that the plaintiff's failure to exercise reasonable care caused the plaintiff to suffer an identifiable item of harm not attributable to the defendant's negligent conduct. *Willis*, 839 N.E.2d at 1188.

It is not enough to establish that the plaintiff acted unreasonably. The defendant must establish resulting identifiable quantifiable additional injury, just as the plaintiff must prove harm resulting from the defendant's acts. When, as here, a defendant claims that after an accident a plaintiff unreasonably failed to follow medical advice, in order to establish a failure to mitigate, the defendant must also prove that the plaintiff's actions caused the plaintiff to suffer a discrete, identifiable harm arising from that failure, and not arising from the defendant's acts alone.

Willis, 839 N.E.2d at 1188.

Whether a post-injury failure to mitigate defense requires expert testimony to establish causation must be resolved on a case-by-case basis; trial courts should analyze whether a lay juror can determine that a particular item of harm was caused by a plaintiff's unreasonable post-injury disregard. *Willis*, 839 N.E.2d at 1188 (holding that trial court erred in giving a failure to mitigate instruction because defendant failed to carry his burden to prove that plaintiff's post-injury disregard of advice as to treatment increased her harm, and if so, by how much).

3189 Punitive Damages

[Punitive damages may be recoverable under intentional and constitutional torts. For punitive damages instructions, see Instruction Nos. 737-745.]

Comments

Indiana's standard for punitive damages is clear and convincing evidence. This differs from the federal court standard of greater weight of the evidence.

G. Privacy Torts

3191 Invasion of Privacy by Intrusion/Intrusion upon Seclusion—Definition

Intrusion upon seclusion occurs when there is an invasion or intrusion on a person's physical space. The invasion or intrusion must be offensive or objectionable to a reasonable person.

Comments

The tort of intrusion upon seclusion requires intrusion into the plaintiff's private physical space. *See Westminster Presbyterian Church of Muncie v. Yonghong Cheng*, 992 N.E.2d 859, 868–69 (Ind. Ct. App. 2013) (concluding that the tort of intrusion has only been found where there was an intrusion by physical contact or an invasion of plaintiff's physical space, and refusing to extend it to cases where the only intrusion is upon plaintiff's emotional solace), *trans. denied*.

There are no cases in Indiana in which a claim of intrusion was proven without physical contact or invasion of the plaintiff's physical space such as the plaintiff's home. *See Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991) (stating that “[w]hen the invasion of a plaintiff's right to privacy takes the form of intrusion, it consists of an intrusion upon the plaintiff's physical solitude or seclusion as by invading his home or conducting an illegal search.”). *See also Curry v. Whitaker*, 943 N.E.2d 354, 357–358 (Ind. Ct. App. 2011) (holding that surveillance cameras did not intrude into the plaintiff's physical space); *Ledbetter v. Ross*, 725 N.E.2d 120, 123 (Ind. Ct. App. 2000) (holding that a single telephone call involving no threats or abusive language cannot constitute intrusion); *Creel v. I.C.E. & Associates, Inc.*, 771 N.E.2d 1276, 1280–81 (Ind. Ct. App. 2002) (holding that there was no intrusion into physical solitude when plaintiff was videotaped in public performing activities observed by many people); *Branham v. Celadon Trucking Svcs., Inc.*, 744 N.E.2d 514, 524 (Ind. Ct. App. 2001) (holding that there was no intrusion into physical solitude because other employees were in the lunchroom when the plaintiff fell asleep and the employees used the break room to eat their lunches and plaintiff was “asleep when the picture was posed and taken [and t]herefore he could not have suffered any emotional disturbance from it.”); *Terrell v. Rowsey*, 647 N.E.2d 662, 667 (Ind. Ct. App. 1995) (holding no intrusion where defendant opened plaintiff's car door, reached behind the driver's seat where plaintiff was seated, and grabbed an empty beer bottle without making physical contact with plaintiff); *F.B.C. v. MDwise, Inc.*, 122 N.E.3d 834, 837 (Ind. Ct. App. 2019) (affirming *Westminster Presbyterian* and stating that “we have specifically chosen not to recognize claims of Intrusion where the intrusion only invades plaintiff's emotional solace.”). *But see MDWise*, 122 N.E.3d at 840 (Judge Bailey dissenting) (“[A]lthough this Court has declined to identify a claim of non-physical intrusion, I do not read binding precedent as foreclosing such a claim. Thus, in light of the technological advances since *Cullison* was decided in 1991, I would follow the Restatement, which recognizes an actionable claim of intrusion “physically or otherwise,” and I would reverse dismissal of this claim.”).

3192 Invasion of Privacy by Intrusion/Intrusion upon Seclusion—Elements

To recover damages from [defendant], [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] intentionally invaded or intruded upon [plaintiff]'s physical space;
- (2) without the consent of [plaintiff]; and,
- (3) the intrusion or invasion would be offensive or objectionable to a reasonable person.

Comments

See comments to Instruction No. 3191.

3193 Invasion of Privacy by Appropriation of Name or Likeness—Definition

An appropriation of name or likeness occurs when an individual uses another's name or likeness for that individual's benefit.

Comments

The most common form of this tort is when a plaintiff's name or likeness is appropriated "to advertise the defendant's business or product, or for some other similar commercial purpose." See *Westminster Presbyterian Church of Muncie v. Yonghong Cheng*, 992 N.E.2d 859, 869 (Ind. Ct. App. 2013) (holding that there was no commercial value appropriated to Westminster due to its use of the Chengs' name in a press release which identified the parties involved and explained the situation and finding that the use of the Chengs' name was not intended to create commercial advantage to Westminster), *trans. denied*.

No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. *It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded.* Id. (quoting *Restatement (Second) of Torts*, § 652C (1977)) (emphasis added).

Corporations may not bring claims for invasion of privacy via appropriation. See *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 595 (Ind. 2001).

3194 Invasion of Privacy by Appropriation of Name or Likeness—Elements

To recover damages from [defendant], [plaintiff] must prove by the greater weight of the evidence that:

- (1) [defendant] knowingly used the name or likeness of [plaintiff];
- (2) [to advertise the [defendant]’s business or product][for a commercial purpose];
- (3) without consent of [plaintiff].

Comments

The most common form of this tort is when a plaintiff’s name or likeness is appropriated “to advertise the defendant’s business or product, or for some other similar commercial purpose.” See *Westminster Presbyterian Church of Muncie v. Yonghong Cheng*, 992 N.E.2d 859, 869 (Ind. Ct. App. 2013) (holding that there was no commercial value appropriated to Westminster due to its use of the Chengs’ name in a press release which identified the parties involved and explained the situation and finding that the use of the Chengs’ name was not intended to create commercial advantage to Westminster), *trans. denied*.

No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. *It is only when the publicity is given for the purpose of appropriating to the defendant’s benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. Id.* (quoting *Restatement (Second) of Torts*, § 652C (1977)) (emphasis added).

Corporations may not bring claims for invasion of privacy via appropriation. See *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 595 (Ind. 2001).

3195 Invasion of Privacy by False Light—Definition

Invasion of privacy by false light is publicity that unreasonably places another person in a false light before the public.

Comments

Carson v. Palombo, 18 N.E.3d 1036, 1047–48 (Ind. Ct. App. 2014); *Miller v. Cent. Ind. Cmty. Found., Inc.*, 11 N.E.3d 944, 959 (Ind. Ct. App. 2014).

3196 Invasion of Privacy by False Light—Publicity—Definition

Publicity occurs when a matter is made public by communicating it:

- (1) to the public at large; or
- (2) to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.

Comments

Curry v. Whitaker, 943 N.E.2d 354, 359–60 (Ind. Ct. App. 2011); Restatement (Second) of Torts § 652D cmt. a & § 652E cmt. a (1977).

This instruction does not include the particular public standard because it is not explicit that this has been adopted. *Walgreen Co. v. Hinchey*, 21 N.E.3d 99, 112 (Ind. Ct. App. 2014) (stating that Indiana has adopted the standard set forth in *Beaumont v. Brown*, 401 Mich. 80, 257 N.W.2d 522 (1977) for evaluating “publicity” in privacy torts). “This Court has repeatedly held that the “particular public” standard included in *Beaumont* is to be applied in this State as well.” *Walgreen* at 112 (citing *Vargas v. Shepherd*, 903 N.E.2d 1026, 1031 (Ind. Ct. App. 2009); *Munsell v. Hambricht*, 776 N.E.2d 1272, 1283 (Ind. Ct. App. 2002)). *But see also F.B.C. v. MDWise, Inc.*, 131 N.E.3d 143, 145 (Ind. 2019) (Rush, C.J., joined by Goff, J., dissenting from denial of transfer and stating that the Court should adhere to the Restatement’s narrower definition of “publicity” and not recognize claims of disclosure to a “particular public”).

This instruction should be given in cases involving invasion of privacy by false light.

3197 Invasion of Privacy by False Light—Elements

To recover damages from [defendant], [plaintiff] must prove by the greater weight of the evidence that:

1. [defendant] made public a matter concerning [plaintiff] that places [plaintiff] in a false light;
2. the false light in which [plaintiff] was placed would be offensive to a reasonable person; and,
3. [defendant] knew the matter made public was false or acted in reckless disregard as to whether it was false.

Comments

Carson v. Palombo, 18 N.E.3d 1036, 1047 (Ind. Ct. App. 2014); *Curry v. Whitaker*, 943 N.E.2d 354, 359 (Ind. Ct. App. 2011); *Branham v. Celadon Trucking Servs., Inc.*, 744 N.E.2d 514, 524 (Ind. Ct. App. 2001), *trans. denied*; Restatement (Second) of Torts § 652E (1977).

A plaintiff cannot succeed on an invasion of privacy by false light claim if the alleged communication is accurate. *Whitaker*, 943 N.E.2d at 359; *Celadon Trucking*, 744 N.E.2d at 525; Restatement, *supra* § 652E cmt. a (“[I]t is essential . . . that the matter published concerning the plaintiff is not true.”).

This instruction may be read in conjunction with the instructions for Truth as a Defense and Publicity.

3198 Invasion of Privacy by False Light—Truth as a Defense

If [defendant] proves by the greater weight of the evidence that the matter made public concerning [plaintiff] was true, then you must decide in favor of [defendant].

Comments

“A plaintiff cannot succeed on an invasion of privacy by false light claim if the alleged communication is accurate.” *Curry v. Whitaker*, 943 N.E.2d 354, 359 (Ind. Ct. App. 2011); *Branham v. Celadon Trucking Servs., Inc.*, 744 N.E.2d 514, 525 (Ind. Ct. App. 2001), *trans. denied* (false light claim failed because communication was not false); Restatement, *supra* § 652E cmt. a.

3199 Damages

If you decide from the greater weight of the evidence that [defendant] is liable to [plaintiff], then you must decide the amount of money that will fairly compensate [plaintiff].

In deciding the amount of money you award, you may consider:

- 1) the harm to [plaintiff]'s interest in privacy resulting from the invasion;
- 2) [plaintiff]'s mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and,
- 3) special damage of which the invasion is a legal cause.

Comments

Carson v. Palombo, 18 N.E.3d 1036, 1048 (Ind. Ct. App. 2014) (citing Restatement (Second) of Torts § 652(H) (1977)). *Henry v. Cmty. Healthcare Sys. Cmty. Hosp.*, 134 N.E.3d 435, 439 n.5 (Ind. Ct. App. 2019). *Baker v. Am. States Ins. Co.*, 428 N.E.2d 1342, 1350 (Ind. Ct. App. 1981).

Cont'l Optical Co. v. Reed, 86 N.E.2d 306, 309–10 (Ind. Ct. App. 1949):

The invasion of one's right of privacy is a tort and if special damages naturally flow therefrom they are recoverable and, even though not specially pleaded, proof thereof is not outside the issues. *Pavesich v. New England Life Ins. Co.*, supra; *Jones v. Herald Post Co.* (1929), 230 Ky. 227, 18 S.W.2d 972; *Themo v. New England Newspaper Pub. Co.* (1940), 306 Mass. 54, 27 N.E.2d 753 (1940).

See also, Ind. Rule Trial P. 9(G).

CHAPTER 3300

CONTRACTS

SYNOPSIS

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3301 Issues for Trial; Burden of Proof

The *Plaintiff*, _____, sued _____, the Defendant.

[*Plaintiff*] claims that [*defendant*][*insert claimed action(s)*]. [*Plaintiff*] must prove [his][her][its] claims by the greater weight of the evidence.

[*Defendant*] denies [*plaintiff*]'s claims. [*Defendant*] is not required to disprove [*plaintiff*]'s claims.

[*Defendant*] has claimed certain defenses. [*Defendant*] must prove [his][her][its] defense[s] of [*specify affirmative defense(s)*] by the greater weight of the evidence.

[(*Plaintiff*) also claims (he)(she)(it) is entitled to an award of punitive damages because (*insert brief statement of claim for punitive damages*). (*Plaintiff*) must prove this claim by clear and convincing evidence.]

Comments

This instruction should be modified to set forth all claims, counterclaims, and cross claims.

Jury Rule 20 and Trial Rule 51(A) require that the trial court give preliminary instructions as to the issues for trial and the burden of proof. The trial court and counsel should carefully prepare a preliminary instruction setting out the issues for trial in narrative form, including all claims, counterclaims, and cross claims. The instruction should be brief, accurate, conversational, and as non-technical as possible.

If a pretrial order has been entered, *see* T.R. 16(J), the Committee recommends that the instruction be drafted based on that order, which supplants the allegations in the pleadings, but should not be rigidly or pointlessly applied. *See Vlach v. Goode*, 515 N.E.2d 569 (Ind. Ct. App. 1987); 62 Am. Jur. 2d PreTrial Conference § 29 at 661 (1972).

Whether a pretrial order has been entered or not, the Committee recommends against reading the pleadings to the jury.

3303 Contract—Definition

A contract is an agreement that consists of:

- (1) an offer made by one [person][entity];
- (2) accepted by another [person][entity]; and,
- (3) supported by something of value.

Comments

An offer, acceptance, and consideration make up the basis for a contract. *Homer v. Burman*, 743 N.E.2d 1144 (Ind. Ct. App. 2001). A contract is formed by the exchange of an offer and acceptance between contracting parties. *Wallem v. CLS Indus.*, 725 N.E.2d 880 (Ind. Ct. App. 2000).

3305 “Something of Value” (Consideration)

A contract becomes enforceable when the parties who agree to enter into the contract exchange something of value.

“Something of value” may include:

- (1) an act, such as the payment of money, performance of services, or delivery of goods;
- (2) a promise to act; or
- (3) a promise *not* to do something, such as a promise not to sue, compete, or act in a certain way.

Comments

“Consideration” sufficient to support a contract means a benefit to the promisor or a detriment to the promisee; in other words, consideration consists of a bargained-for exchange. *Paint Shuttle, Inc. v. Continental Cas. Co.*, 733 N.E.2d 513 (Ind. Ct. App. 2000).

Consideration exists if it is shown that any right, profit, or benefit accrued to one party, or that responsibility was suffered or undertaken by another. *Huntingburg Production Credit Ass’n v. Griese*, 456 N.E.2d 448 (Ind. Ct. App. 1983).

Consideration for a promise may consist either of an act or forbearance or another promise. *Salt Springs Nat’l Bank v. Schlosser*, 91 Ind. App. 295, 171 N.E. 202 (1930).

A party raising the defense of lack of consideration has the burden of proving it. *Nicholas v. Zimmerman*, 159 Ind. App. 525, 307 N.E.2d 900 (1974).

“Consideration” in a contract consists of either a benefit to the promisor or a detriment to the promisee. *AM General, LLC v. Armour*, 46 N.E.3d 436 (Ind. 2015). Modification of a contract, because it is also a contract, requires all of the elements of a contract and must have adequate consideration.

3307 Breach of Contract

A breach of contract occurs when:

- (1) a party fails to perform all the duties [he][she][it] agreed to do; or
- (2) a party places [himself][herself][itself] in such a position that it is beyond [his][her][its] power to perform the contract.

Comments

A party breaches a contract either by failing to perform all of its contractual obligations or by placing itself in a position where it is unable to perform those obligations. *Strodtman v. Integrity Builders, Inc.*, 668 N.E.2d 279 (Ind. Ct. App. 1996); *see also Indiana Gas & Water Co. v. Williams*, 132 Ind. App. 8, 175 N.E.2d 31 (1961).

3309 Breach of Contract—Elements—Burden of Proof

To recover damages from [defendant], [plaintiff] must prove all of the following by the greater weight of the evidence:

- (1) The parties entered into a contract;
- (2) [plaintiff] performed [his][her][its] part of the contract;
- (3) [defendant] failed to perform [his][her][its] part of the contract [or performed in a defective manner];
- (4) [defendant]'s breach of contract damaged [plaintiff];
- (5) the parties reasonably anticipated those damages when they entered into the contract; and
- (6) [defendant]'s breach of contract was a responsible cause of those damages.

Comments

The essential elements of a contract action are: (1) a valid and binding contract, (2) performance by the complaining party, (3) nonperformance or defective performance by the defendant, and (4) damages arising from defendant's breach. *Strong v. Commercial Carpet Co.*, 163 Ind. App. 145, 322 N.E.2d 387, 391 (1975); *Rogier v. American Testing & Eng'g Corp.*, 734 N.E.2d 606 (Ind. Ct. App. 2000).

On damages, see *Strong v. Commercial Carpet Co.*, 163 Ind. App. 145, 322 N.E.2d 387 (1975); see also *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854).

No exception exists to the general rule that punitive damages are not recoverable in a contract action. *Miller Brewing Co. v. Best Beers*, 608 N.E.2d 975 (Ind. 1993). To recover punitive damages in an action founded upon a breach of contract, the plaintiff must plead and prove the existence of an independent tort for which Indiana would permit the recovery of punitive damages. *Miller*, 608 N.E.2d at 984; see, e.g., *Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 520 (Ind. 1993) (independent tort action for breach of insurer's duty to deal with insured in good faith).

3311 Responsible Cause (Proximate Cause)—Definition

A person's conduct is legally responsible for causing [an injury][property damage][a death] if:

- (1) the [injury][property damage][a death] would not have occurred without the conduct, and
- (2) the [injury][property damage][a death] was a natural, probable, and foreseeable result of the conduct.

This is called a “responsible cause.”

[There can be more than one responsible cause for an injury.]

Comments

Scholars identify the use of legal jargon and arcane legalese as the most serious flaws of contemporary jury instructions. John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1209 (2002). In fact, in one study of 14 jury instructions, the proximate cause instruction produced proportionally the most misunderstanding among laypersons. The study revealed that jurors mistake “proximate cause” for “approximate cause,” “estimated cause,” or some fabrication. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979); see also Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L.J. 456, 468 (1962) (“proximate cause” is frequently misinterpreted to mean “probable” or “approximate cause”); James D. Wascher, *The Importance of Juries: The Long March Toward Plain English Jury Instructions*, 19 Chicago Bar Ass’n Record 50, 50–51 (2005) (a Chicago judge reported that he presided over a trial in which the jury sent him a note asking whether proximate cause meant “it’s pretty close to the cause”).

Prosser and Keeton say that proximate cause “is an unfortunate word, which places entirely the wrong emphasis on the factor of physical or mechanical closeness.” Prosser & Keeton, *The Law of Torts* § 42. They even imply that it was a sin to have coined the term “proximate cause” in the first place. Prosser & Keeton, *The Law of Torts* § 42 (“The word ‘proximate’ is a legacy of Lord Chancellor Bacon, who in his time committed other sins.”) The Committee has determined that use of a term so likely to be misunderstood is against the policy behind clear jury instructions.

There are two types of causation in a negligence case—causation in fact and proximate cause. See, e.g., Prosser & Keeton, *The Law of Torts* §§ 41 (causation in fact), 42 (proximate cause) (5th ed. 1984). Causation in fact is the threshold question of whether “but for” the defendant’s negligent conduct, plaintiff’s harm would not have occurred. Or, to put it another way, plaintiff’s harm would not have occurred without the defendant’s negligent conduct. *Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981) (citing W. Prosser, *Handbook of the Law of Torts* § 41 (4th ed. 1971); 21 I.L.E. Negligence § 62 (1959)). Because the consequences of an act go forward to eternity and back before the dawn of human events, there must also be “some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.” Prosser &

Keeton, *The Law of Torts* § 41. This is proximate cause, and it boils down to “whether the conduct has been so significant and important a cause that the defendant should be legally responsible.” Prosser & Keeton, *The Law of Torts* § 41. Prosser and Keeton therefore suggest that either “responsible cause” or “legal cause” would be a more appropriate term. Prosser & Keeton, *The Law of Torts* § 41. Because use of the term “legal cause” might suggest to the jury that there could also be an “illegal cause,” the Committee selected “responsible cause.”

The Indiana Supreme Court has held that a proximate cause instruction is not *required* to refer to “but for” causation, “so long as the instructions as a whole adequately convey the law in this area.” *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 301 (Ind. 2009). To ensure that the instructions as a whole *do* adequately convey both proximate cause and causation in fact, the Committee has included both concepts in this one instruction. Subpart (1) of the instruction (“the injury would not have occurred without the conduct”) instructs on causation in fact. And because the Indiana Supreme Court has explained proximate cause as the natural and probable consequence of the conduct, subpart (2) of the instruction (“the injury was a natural and probable result of the conduct”) instructs on proximate cause. “A negligent act is said to be the proximate cause of an injury ‘if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.’ ” *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003) (quoting *Bader v. Johnson* 732 N.E.2d 1212, 1218 (Ind. 2000)).

Plaintiff in a negligence action has the burden of proving causation in fact by a preponderance of the evidence. *Turner v. Davis*, 699 N.E.2d 1217 (Ind. Ct. App. 1998) (causation in fact); *Carter v. Aetna Life Ins. Co.*, 217 Ind. 282, 27 N.E.2d 75 (1940) (proximate cause). What is the proximate cause of the injury is ordinarily a question of fact for the jury that becomes a question of law when only a single conclusion can be drawn from the facts. *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101 (Ind. Ct. App. 1999).

The court is not required to repeat the substance of an instruction defining proximate cause, and outlining the necessity of establishing it, in every general instruction relating to the subject of negligence. *Swallow Coach Lines, Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938).

The “conduct” discussed in this Instruction includes acts and omissions. *See, e.g.*, Instruction Nos. 909 and 1107.

There can be more than one responsible cause for an injury. *See, e.g.*, *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006) (“An injury may have more than one proximate cause.”); *Board of Comm’rs v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992) (“There may be more than one proximate cause of an event.”); *Krohn v. Shidler*, 140 Ind. App. 175, 185 (1966) (“It is not necessary that such negligence be the sole proximate cause.”). The bracketed sentence about multiple responsible causes should be given when it is an issue in the case.

3312 Foreseeable—Defined

[An injury][Property damage][A death] is “foreseeable” when a person should realize that [his][her] act or failure to act might cause harm.

Comments

In the context of proximate/responsible cause, the question is whether the injury “is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.” *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 108 (Ind. 2002) (citing *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000)). “The determination of what is reasonably foreseeable is not judged by the subjective opinions of those involved, but is based upon the standard of due care in avoiding a result which might reasonably have been anticipated in the ordinary experience of people.” *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 917–18 (Ind. Ct. App. 2001) (citing *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101, 1105 (Ind. Ct. App. 1999)). When some harm is foreseeable, a person is responsible for any injury even if the extent of the injury was unforeseeable. *Bolin v. Wingert*, 764 N.E.2d 201, 207–08 (Ind. 2002). “If the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor’s negligence.” *Hampton v. Moistner*, 654 N.E.2d 1191, 1194 (Ind. Ct. App. 1995).

3313 Measure of Damages

If you decide that [*defendant*] has breached the contract, the measure of [*plaintiff*]'s damages is the amount that would put [*plaintiff*] in the same position [*he*][*she*][*it*] would have been in had the contract been fulfilled.

[*Plaintiff*] may only recover the loss actually suffered and should not be placed in a better position than if [*defendant*] had not breached the contract.

Comments

See *Jay Clutter Custom Digging v. English*, 181 Ind. App. 603, 393 N.E.2d 230 (1979); *Potts v. Offutt*, 481 N.E.2d 429 (Ind. Ct. App. 1985).

If you have a case of related claims of both tort and contract, you may need to instruct on both theories. Compare, e.g., *Indianapolis-Marion County Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722 (Ind. 2010) (tort claim was improper in a contract and breach of warranty case) with *INS Investigations Bureau, Inc. v. Lee*, 784 N.E.2d 566 (Ind. Ct. App. 2003) (plaintiffs could plead alternative theories of negligence and breach of implied warranty, but they could not recover duplicative damages) and *Foster v. Evergreen*, 716 N.E.2d 19 (Ind. Ct. App. 1999) (plaintiff entitled to file suit on both contract and tort); see also *State Farm Mut. Auto. Ins. Co. v. Earl*, 33 N.E.3d 337 (Ind. 2015) (discussing proof of tort damages in an uninsured breach of contract action).

3315 Unilateral Contract

A unilateral contract begins when one person promises to do something if another person acts or refrains from acting in a certain way. The contract is formed when the second person acts or refrains from acting. Then, the first person must fulfill his promise.

An example of a unilateral contract is the offer of a reward for the return of a lost dog. When the dog is returned, the reward must be paid.

Comments

If a judge gives this instruction, he or she should give it along with Instruction No. 3303.

Ordinarily, a unilateral contract involves no bargaining process or exchange of promises by parties; only one party makes an offer (or promise) which invites performance by another. *Orr v. Westminster Village North*, 689 N.E.2d 712 (Ind. 1997). Performance constitutes both acceptance of that offer and consideration. *Orr*, 689 N.E.2d 712.

3317 Contract Implied in Law—Elements—Burden of Proof

[Plaintiff] claims [defendant] owes [him][her] damages, because their contract was “implied in law,” even though they did not formally agree in writing or in speech.

To prove an implied contract, [plaintiff] must prove all of the following by the greater weight of the evidence:

- (1) [plaintiff] provided something of value to [defendant];
- (2) at either the [express][explicit] or implied request of [defendant];
- (3) under circumstances where fairness requires that [plaintiff] be compensated; and
- (4) compensation is necessary to prevent [defendant] from being unjustly enriched at [plaintiff]’s expense.

Comments

Although Indiana courts have used the phrases quasi-contract, contract implied-in-law, constructive contract, and *quantum meruit* synonymously, *Nehi Beverage Co. v. Petri*, 537 N.E.2d 78 (Ind. Ct. App. 1989), *quantum meruit* is different from the other terms. Quasi-contract, contract implied-in-law, and constructive contract involve obligations that are imposed by law, without regard to the assent of the parties bound, to permit a contractual remedy where no contract exists, whereas *quantum meruit* is a breach of contract remedy available to the innocent party to recover the value of services performed under the contract. *Indianapolis v. Twin Lakes Enterprises, Inc.*, 568 N.E.2d 1073 (Ind. Ct. App. 1991); *Federal Life Ins. Co. v. Maxam*, 70 Ind. App. 266, 117 N.E. 801 (1917). Courts created these legal fictions to provide a remedy to prevent the unjust enrichment of one party at the expense of another. *Wallem v. CLS Indus.*, 725 N.E.2d 880 (Ind. Ct. App. 2000).

Generally, there can be no quasi-contract, contract implied-in-law, or constructive contract recovery where an express contract exists between the parties in reference to the *same* subject matter. *Indianapolis*, 568 N.E.2d 1073. In a proper case where there is a dispute as to existence of a contract or where the express contract arguably covers a different subject than that upon which a party seeks recovery in quasi-contract, a trial court may properly submit both the theory of breach of contract and quasi-contract to the jury as an alternative basis for recovery. See *Indianapolis*, 568 N.E.2d 1073. In such a case, the judge should instruct the jury that the claims are alternative, and the plaintiff may not recover under both theories. *Indianapolis*, 568 N.E.2d at 1082; see also *Foster v. United Home Improv. Co.*, 428 N.E.2d 1351 (Ind. Ct. App. 1981).

The party claiming quasi-contract must demonstrate that he rendered a benefit to another person on that person’s implied or express request and under circumstances in which justice demands compensation to prevent unjust enrichment. *Briggs v. Clinton County Bank & Trust Co.*, 452 N.E.2d 989 (Ind. Ct. App. 1983). See also *Estate of Henry v. Woods*, 2017 Ind. App. Lexis 209 (Ind. Ct. App. 2017).

3319 Contract Implied in Fact

A contract may be created by the conduct of the parties, without any written or spoken words.

You may decide that the parties entered into a contract if you decide from their conduct that they mutually intended to agree.

Comments

An implied contract arises out of acts and conduct of the parties, coupled with a meeting of the minds and the parties' clear intent in the agreement. *McQueeney v. Glenn*, 400 N.E.2d 806 (Ind. Ct. App. 1980). Contracts and covenants implied in fact arise from the parties' course of dealing and may be evidenced by acts done in the course of performance or by ordinary trade practices. *Johnson v. Scandia Assocs.*, 717 N.E.2d 24 (Ind. 1999).

An implied contract, or a contract implied in fact, is a true contract and therefore requires mutual assent. *Dyer Constr. Co. v. Ellas Constr. Co.*, 153 Ind. App. 304, 287 N.E.2d 262 (1972). The parties' intent is a factual matter to be determined by the jury from all of the circumstances. *Continental Grain Co. v. Followell*, 475 N.E.2d 318 (Ind. Ct. App. 1985).

Contracts implied in fact should be distinguished from the equitable remedy of contracts implied in law that may be granted by the court to prevent unjust enrichment. Contracts implied in law, more properly termed constructive or quasi-contracts, are not contracts in the true sense; they rest on a legal fiction imposed by law without regard to assent of the parties. *Dyer Constr. Co.*, 287 N.E.2d 262. For more information on contracts implied in law, see Instruction No. 3317; *Zoeller v. East Chicago Second Century, Inc.*, 904 N.E.2d 213 (Ind. 2009).

3321 Promissory Estoppel

If [plaintiff] proves all of the following by the greater weight of the evidence:

- (1) [defendant] made a definite and substantial promise, expecting [plaintiff] to rely on it;
 - (2) [plaintiff] reasonably relied on [defendant]'s promise;
 - (3) [plaintiff] was harmed as a result; and
 - (4) fairness requires that [defendant]'s promise be enforced,
- then [defendant] is bound by that promise.

Comments

Estoppel is the misleading of a party entitled to rely on the acts or statements in question, combined with a resulting change of position to that party's detriment. *Weinig v. Weinig*, 674 N.E.2d 991, 997 (Ind. Ct. App. 1996). Fraud need not be proven. *Weinig*, 674 N.E.2d at 997.

A party claiming estoppel must prove: (1) a representation or concealment of material facts, (2) made with knowledge of the facts, (3) with the intention that the other party should act upon it, and the party to whom the representation was made was: (4) ignorant of the matter and (5) induced to act upon it. *Reeve v. Georgia-Pacific Corp.*, 510 N.E.2d 1378, 1382 (Ind. Ct. App. 1987).

The promise must be definite and substantial. *Spring Hill Developers, Inc. v. Arthur*, 879 N.E.2d 1095, 1100 (Ind. Ct. App. 2008).

Promissory estoppel is an exception to the general rule that estoppel is not available upon promises to be performed in the future. *Reeve*, 510 N.E.2d at 1384. Promissory estoppel has been submitted to the jury. *See, e.g., Knauf Fiber Glass, GmbH v. Stein*, 622 N.E.2d 163 (Ind. 1993).

Promissory estoppel is based on the underlying principle that one who by conduct has induced another to act in a particular manner will not be permitted to adopt an inconsistent position, attitude, or course of conduct that causes injury to that other. *Lockett v. Planned Parenthood of Ind., Inc.*, 42 N.E.3d 119 (Ind. Ct. App. 2015).

3323 Substantial Performance

[A person who][An entity that] acts in good faith under a contract, and substantially performs what the contract requires, may recover damages from the other party to the contract.

[He][She][It] may recover the agreed contract price, minus the lost value caused by minor defects in that work.

Comments

Substantial performance is something that lacks full, strict performance only in some nonessential points and is practically as good as full performance. *McConnell v. Fulmer*, 230 Ind. 576, 105 N.E.2d 817 (1952).

“Substantial performance” applies only where performance of a nonessential condition is lacking so that the benefits received by a party are far greater than the injury done to him by the breach of the other party. *Gibson v. Neu*, 867 N.E.2d 188 (Ind. Ct. App. 2007).

3325 Performance Prevented by Party

When one party to a contract prevents another party from performing any part of the contract, the party who is prevented is excused from completing the rest of [his][her][its] duties under the contract.

The excused party may recover compensation for the work [he][she][it] has completed. The excused party may also recover compensation for damages suffered when [he][she][it] was prevented from performing duties under the contract.

Comments

A party who has partly performed the contract may recover the value of the benefits received and accepted by the other party where full performance is prevented by the other party. *Drost v. Professional Bldg. Serv. Corp.*, 153 Ind. App. 273, 286 N.E.2d 846 (1972); *Jones v. Servel, Inc.*, 135 Ind. App. 171, 186 N.E.2d 689 (1962). The common law of contracts excuses performance where the other party wrongfully prevents that performance. *Rockford Mut. Ins. Co. v. Pirtle*, 911 N.E.2d 60 (Ind. Ct. App. 2011); *Rogier v. American Testing and Engineering Corp.*, 734 N.E.2d 606 (Ind. Ct. App. 2000).

3327 Impossibility of Performance

If performance of a contract becomes impossible, through no fault of either party or because of facts unknown to either party at the time the contract was made, then both parties are excused from performance.

Comments

The general rule is that, when a contract's performance becomes impossible, nonperformance is excused. *Hipskind Heating & Plumbing Co. v. General Industries, Inc.*, 136 Ind. App. 647, 194 N.E.2d 733 (1963); *Leas v. Patterson*, 38 Ind. 465 (1871); see also *Marshall County Redi-Mix, Inc. v. Matthew*, 458 N.E.2d 219 (Ind. 1984) (where subject matter of construction contract was destroyed during construction through no fault of property owner, contractor cannot enforce a mechanic's lien).

Performance will generally not be excused, however, simply because a contract causes hardship or proves to be unprofitable or burdensome. *Madison Plaza, Inc. v. Shapira Corp.*, 180 Ind. App. 141, 387 N.E.2d 483 (1979); *Allied Structural Steel Co. v. State*, 148 Ind. App. 283, 265 N.E.2d 49 (1970).

To invoke impossibility, one must demonstrate that performance is not merely difficult or relatively impossible, but absolutely impossible owing to the act of God, the act of law, or the loss or destruction of the subject matter of the contract. *Wagler v. West Boggs Sewer Dist, Inc.*, 980 N.E.2d 363 (Ind. Ct. App. 2012).

3329 Time of Performance

If you decide that performance at the exact time agreed upon was vitally important to the parties, you may decide that failure of a party to perform on time is a breach of contract.

In a contract that fixes no specific time, the law implies a reasonable time for performance.

Comments

Whenever time is found to be of the essence, an unexcused delay in performance constitutes a breach of the contract. *Phillips v. Green Street Corp.*, 143 Ind. App. 30, 237 N.E.2d 590 (1968). A provision that time is of the essence may become a part of the terms of the contract either from the terms of the document or from the conduct of the parties showing that this was their intent. *Burnett Coal Mining Co. v. Schrepferman*, 77 Ind. App. 45, 133 N.E. 34 (1921).

Where a contract does not specify time for performance, the law implies that it must be performed within a reasonable time. *Gibson Co. v. Morton*, 88 Ind. App. 685, 148 N.E. 430 (1925). What constitutes a reasonable amount of time depends upon the subject matter of the contract, the situation of the parties, and the circumstances attending performance. *Harrison v. Thomas*, 761 N.E.2d 816 (Ind. 2002); *Indiana Tri-City Plaza Bowl, Inc. v. Estate of Glueck*, 422 N.E.2d 670 (Ind. Ct. App. 1981); *Jay Clutter Custom Digging v. English*, 181 Ind. App. 603, 393 N.E.2d 230 (1979).

3331 Accord and Satisfaction

An accord and satisfaction is an agreement that [relieves the parties from the obligations of a contract][settles a dispute], and the performance of that agreement.

The “accord” is a new agreement that [relieves the parties from the obligations of a contract][settles a dispute].

The “satisfaction” is the actual performance of the new agreement.

[Name of party] has the burden of proving both the accord and satisfaction by the greater weight of the evidence.

Comments

Accord and satisfaction is an affirmative defense which must be specifically pleaded and proven by the party raising it. *Turner v. Nationstar Mortgage*, 45 N.E.3d 1257 (Ind. Ct. App. 2015).

This instruction is adapted from *Reed v. Dillon*, 566 N.E.2d 585, 590 (Ind. Ct. App. 1991). Accord and satisfaction is normally a question of fact for the jury to determine, but where the controlling facts are undisputed, the question becomes one of law. *Daube & Cord v. La Porte County Farm Bureau Co-Operative Ass’n*, 454 N.E.2d 891, 894 (Ind. Ct. App. 1983).

3333 Mutual Mistake of Fact

A contract may be set aside because of mutual mistake of fact.

To set aside a contract based on a mutual mistake of fact, [*defendant*] must prove all of the following:

- (1) [both][all] parties to the contract had a common belief about a fact crucial to the contract;
- (2) [both][all] parties were mistaken in their belief; and
- (3) if the parties had not been mistaken, [*defendant*]'s decision about whether to enter into the contract reasonably might have been different.

Comments

Where both parties to a contract share a common assumption about a vital fact upon which they based their bargain, and that assumption is false, the transaction may be avoided if, because of the mistake, a quite different exchange of values occurs from the exchange of value contemplated by the parties; there is no contract, because the minds of the parties have in fact never met. *Williamson v. U.S. Bank N.A.*, 55 N.E.3d 906 (Ind. Ct. App. 2016).

This instruction is based on *Wilkin v. 1st Source Bank*, 548 N.E.2d 170 (Ind. Ct. App. 1990) (citing *Board of School Comm'rs v. Bender*, 36 Ind. App. 164, 72 N.E. 154 (1904)).

A fact is material if the fact omitted or misstated, if truly stated, might reasonably influence the party's decision regarding whether to enter into the transaction. *Curtis v. American Community Mut. Ins. Co.*, 610 N.E.2d 871 (Ind. Ct. App. 1993).

3335 Undue Influence—Operation of Law

The law presumes that trust and confidence existed between [defendant] and [plaintiff] because of their relationship, and that the relationship influenced [defendant].

You must decide whether the transaction between [defendant] and [plaintiff] gave [plaintiff] an advantage.

If you decide that the transaction gave [plaintiff] an advantage, then you must assume that the transaction resulted from undue influence and is void.

However, if [plaintiff] proves by clear and convincing evidence that the transaction was not a result of the relationship and was fair, then you should not assume that the transaction resulted from undue influence.

Comments

There are two categories of undue influence—one presumed based solely upon relationship, and another that requires more, including proving *how* the relationship was fiduciary. This instruction is for the former case, the latter case is discussed in Instruction No. 3327.

Relationships that meet the standard of this instruction include pastor and parishioner, attorney and client, guardian and ward, principal and agent, and parent and child, but other relationships may also meet these criteria. *Hunter v. Milhous*, 159 Ind. App. 105, 305 N.E.2d 448 (1973).

The law “no longer recognizes a presumption of undue influence in a transaction between spouses based on the confidential relationship of husband and wife and a showing that the dominant spouse benefitted from the transaction. Rather, the burden of proof remains with the spouse seeking to set aside the transaction to establish that the other spouse exercised undue influence.” *Womack v. Womack*, 622 N.E.2d 481, 483 (Ind. 1993).

It is generally a question of law as to whether such a relationship exists, and if the court finds such a relationship and the jury finds an advantage to the dominant party, the burden then shifts to the dominant party to show by clear and unequivocal evidence that the transaction between them was made at arms length. *Blaising v. Mills*, 176 Ind. App. 141, 374 N.E.2d 1166 (1978).

For cases involving presumptions based upon relationship alone, the burden on the dominant party is clear and convincing evidence. *Carlson v. Warren*, 878 N.E.2d 844, 851 (Ind. Ct. App. 2007); *Womack*, 622 N.E.2d at 483; *but see Briggs v. Clinton County Bank & Trust Co.*, 452 N.E.2d 989, 999 (Ind. Ct. App. 1983) (calling the burden in an attorney-client relationship preponderance of the evidence).

This instruction should be revised if a party other than the defendant raises undue influence.

3337 Undue Influence—Finding of Relationship

The law presumes that trust and confidence exists between people in certain relationships, including legal, moral, social, domestic, or personal relationships.

Trust and confidence can influence decisions people make. Sometimes people use trust and confidence to unduly influence decisions. The law voids transactions that are the result of undue influence.

If [defendant] proves by the greater weight of the evidence that:

- (1) a relationship of confidence and trust existed between the parties;
- (2) because of that relationship, the parties did not deal on equal terms, because [plaintiff]:
 - (a) had superior knowledge of the matters involved in the transaction, or
 - (b) was in a position to exercise excessive influence over [defendant]; and
- (3) the result gave an unfair advantage to [plaintiff]

then you must assume that the transaction resulted from undue influence and is void.

However, if [plaintiff] proves by the greater weight of the evidence that [insert elements at issue], then you should not assume that the transaction resulted from undue influence.

Comments

There are two categories of undue influence—one presumed based solely upon relationship, and another that requires more, including proving *how* the relationship was fiduciary. This instruction is for the latter case, the former case is discussed in Instruction No. 3335.

In this type of case, the Committee assumes that it is generally a question of fact as to whether such a relationship exists. If a fiduciary relationship exists, a presumption of undue influence arises. *In re Watts*, 918 N.E.2d 330, 331 (Ind. 2009). The burden then shifts to the dominant party to show that the transaction between them was fair and understood between the parties. *Villanella v. Godbey*, 632 N.E.2d 786, 790 (Ind. Ct. App. 1994) (involving a power of attorney); *see also Hamilton v. Hamilton*, 858 N.E.2d 1032, 1037 (Ind. Ct. App. 2006).

For cases involving presumptions based upon relationship alone, the burden on the dominant party is clear and convincing evidence. *Womack v. Womack*, 622 N.E.2d 481, 483 (Ind. 1993). It is unclear whether the burden is the same for fiduciary cases, but the Committee has assumed that a preponderance standard applies.

This instruction should be revised if a party other than the defendant raises undue influence.

3339 Waiver

A person can waive his or her known right by voluntarily and intentionally giving it up. If [name of party claiming waiver] proves by the greater weight of the evidence that when [name of other party] acted, [he][she][it]:

- (1) knew [he][she][it] had the right to [insert right claimed to be waived];
- (2) fully understood that right; and
- (3) intentionally gave up that right,

then you should decide that [name of other party] waived that right.

Comments

See *Conner v. Fisher*, 136 Ind. App. 511, 202 N.E.2d 572 (1964); *Egnatz v. Medical Protective Co.*, 581 N.E.2d 438 (Ind. Ct. App. 1991).

In addition to an express waiver, Indiana has recognized that a waiver may be implied by the acts or conduct of the parties, but only upon proof of a plaintiff's clear, unequivocal, and decisive act showing the waiver. *Russell v. Trustees of Purdue Univ.*, 93 Ind. App. 242, 178 N.E. 180 (1931).

Mere silence is not waiver, unless there is an obligation to speak. *Union Federal Sav. Bank v. INB Banking Co. Southwest*, 582 N.E.2d 426, 431-32 (Ind. Ct. App. 1991).

3341 Duress

A document signed under duress is invalid. Duress means any restraint, threat, intimidation, or bodily harm directed at a person that coerces the person to sign a document, when that person lacks the strength of mind or will to resist.

The party claiming duress has the burden of proving duress by the greater weight of the evidence. To decide whether a person has proved duress, you must consider [his][her] power to resist, under the circumstances shown by the evidence. Among other things, you may consider evidence such as the person's age, experience, health, and mental state.

Comments

This instruction should be modified to correspond to evidence of characteristics other than age, experience, health, and mental state.

Duress is an actual or threatened violence or restraint of a person contrary to law to compel execution of a contract. *Rutter v. Excel Industries, Inc.*, 438 N.E.2d 1030 (Ind. Ct. App., 1982).

"Economic duress" does not come within Indiana's definition of duress; where the alleged victim acted freely and voluntarily and the contract was induced, not by loss of volition but a desire to avoid inconvenience, delay or economic hardship, duress was not present. *Raymundo v. Hammond Clinic Ass'n*, 449 N.E.2d 276 (Ind. 1983).

CHAPTER 3500

AGENCY

SYNOPSIS

Introduction

- 3501 Partnership, LLC, or Corporation—Definition
- 3503 Partnership—Partnership Bound by Partner's Wrongful Act; Nature of Partner's Liability
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- 3507 Principal, Agent—Defined
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- 3519 Independent Contractor as Agent
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- 3527 Respondeat Superior—Vicarious Liability
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Introduction

The instructions in this chapter are primarily designed for use in tort cases where both the principal and the agent have been sued by a third party. Some instructions may be applicable in an action between the principal and an agent. This chapter also includes instructions relating to partnership or independent contractor, which may be used where the relationship between co-defendants is an issue.

3501 Partnership, LLC, or Corporation—Definition

[A partnership is an association of two or more people to conduct a business for profit as co-owners.]

[A limited liability company (LLC) is an unincorporated association distinct from its members. The members have limited liability while still participating in the company’s management.]

[A corporation is a for-profit legal entity distinct from its owners and created by incorporation under the law of Indiana.][A foreign corporation is incorporated under a law outside of Indiana.]

Comments

This is not an exhaustive list of legal entities and the definition should be tailored to the facts of the case.

This instruction is based on the definition of a partnership in the Uniform Partnership Act. Ind. Code § 23-4-1-6(1). Ind. Code § 23-4-1-7 sets out rules for determining the existence of a partnership. A contract, either express or implied, is essential to the formation of a partnership. *J.M. Schultz Seed Co. v. Robertson*, 451 N.E.2d 62 (Ind. Ct. App. 1983). Each partner should be named as a defendant in an action against a partnership entity. *Steiner v. Goodwin*, 138 Ind. App. 546, 215 N.E.2d 361 (1966).

“LLC” is defined in Ind. Code § 23-18-1-11. “Corporation” is defined in Ind. Code § 23-1-20-5.

3503 Partnership—Partnership Bound by Partner's Wrongful Act; Nature of Partner's Liability

If, in the ordinary course of business or with the authority of the other partners, a partner wrongfully acts or fails to act, the partnership and each partner is liable to the same extent as the partner who acted or failed to act.

Comments

This instruction is based on Ind. Code § 23-4-1-13. Indiana Code § 23-4-1-15 further discusses the nature of a partner's liability. *See, e.g.*, Ind. Code § 23-4-1-15(1)(b) (all partners are liable jointly for all other debts and obligations of the partnership, but any partner may enter into a separate obligation to perform a partnership contract).

The partnership relation includes the relation of principal and agent, but differs from pure agency in that a partner, when acting for the partnership, binds himself and his co-partners while an agent acts for his principal alone. 2 C.J.S. Agency § 2. A joint venture is distinguished from a partnership only in that a partnership is formed for the general business of a particular kind, whereas a joint venture contemplates a single business transaction. *Lafayette Bank & Trust Co. v. Price*, 440 N.E.2d 759 (Ind. Ct. App. 1982).

An admission or representation made by any partner concerning partnership affairs within the scope of his authority is evidence against the partnership. Ind. Code § 23-4-1-11.

Innocent co-partners are not liable for punitive damages resulting from the intentional torts of a defendant partner when committed out of purely personal motives or with no purpose or effect to benefit the partnership, because the rationale behind punitive damages prohibits awarding such damages against an individual who is personally innocent of any wrongdoing. *Bymaster v. Bankers Nat'l Life Ins. Co.*, 480 N.E.2d 273 (Ind. Ct. App. 1985). On the other hand, although fraud in conversion of a client's funds is not part of the ordinary course of a law partnership, the partnership may be responsible for the act of a partner who misapplies money entrusted to him and may be obligated to pay compensatory damages for the client's loss. *Bymaster*, 480 N.E.2d 273.

3505 Agency—Liability for Officers’/Employees’/Agents’ Actions

A [insert type of legal entity] acts through its agents. If, within the scope of [his][her][its] authority, a [insert type of legal entity]’s agent wrongfully acts or fails to act, the [insert type of legal entity] is liable for that action or inaction.

Comments

A corporation can act only through its agents, and their acts, when done within the scope of their authority, are attributable to the corporation. *Houser v. State*, 661 N.E.2d 1213 (Ind. Ct. App. 1996).

Between a corporation and third parties, the directors are the general agents of the corporation. *Cox v. Baltimore & O. S. W. R. Co.*, 180 Ind. 495, 502, 103 N.E. 337, 340 (1913).

The directors have the power to delegate some of their powers to corporate officers and inferior agents, who in turn will have the authority to represent and bind the corporation. *See 7 I.L.E. Corporations* § 135.

A corporation is liable for the willful acts and negligence of its agents committed within the general scope of their employment, even if the corporation did not previously authorize or subsequently ratify the acts. *Polk Sanitary Milk Co. v. Berry*, 106 Ind. App. 29, 17 N.E.2d 860 (1938).

An agent can bind the LLC under Ind. Code § 23-18-3-1.1(b). Except as provided in Ind. Code § 23-18-3-1.1(c) or the articles of organization, each member is an agent of the limited liability company for the purpose of the limited liability company’s business.

3507 Principal, Agent—Defined

A principal is one who authorizes another to act on [his][her][its] behalf, subject to the principal's control. The authorized [person][entity] is called an agent.

Comments

Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act. Restatement 3d Agency § 1.01.

The principal in an agency relationship exercises control over the details of the work to be performed by the agent. *Western Adjustment & Inspection Co. v. Gross Income Tax Div.*, 236 Ind. 639, 142 N.E.2d 630 (1957). An agency relationship can exist only if the agent is subject to the principal's control with respect to work details. *United Artists Theatre Circuit, Inc. v. Indiana Dep't of State Revenue*, 459 N.E.2d 754 (Ind. Ct. App. 1984).

3509 General Agent—Definition

A general agent is one who agrees with a principal to handle [all of the principal's business][all of the principal's business of a particular kind][all of the principal's business at a particular place]. The principal has given the general agent the authority to handle that business.

Comments

If there is a question of fact as to whether an agent was a general or special agent, this instruction should be given with Instruction No. 3511, which defines a special agent. This definition and the definition of a special agent are from *Farm Bureau Mut. Ins. Co. v. Coffin*, 136 Ind. App. 12, 186 N.E.2d 180 (1962).

The nature and extent of the authority of an agent and whether the act in controversy was within the scope of the agent's authority are ordinarily questions of fact to be determined by the jury. *Chrysler Corp. v. Bolser*, 102 Ind. App. 310, 200 N.E. 417 (1936). If an agent's authority is defined in writing or by other uncontradicted evidence, the scope, or extent, of such authority is a question of law. *Modern Woodmen of Am. v. Lyons*, 76 Ind. App. 641, 128 N.E. 651 (1920); *see also Bradford v. Chism*, 134 Ind. App. 501, 506, 186 N.E.2d 432, 435 (1963). All of the acts and dealings of the agent are competent evidence on the character of the agency. *Jasper County Farms Co. v. Holden*, 79 Ind. App. 214, 137 N.E. 618 (1923).

3511 Special Agent—Definition

A special agent is one authorized by a principal to perform one or more specific acts, either:

- (1) according to the principal's specific instructions; or
- (2) within the limits implied by the authorized acts.

Comments

This definition and the definition of a general agent are from *Farm Bureau Mut. Ins. Co. v. Coffin*, 136 Ind. App. 12, 186 N.E.2d 180 (1962). A special agent is one authorized to do one or more specific acts but not to conduct business generally for the principal. *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1304 (Ind. 1998).

The principal is not bound by acts of his special agent if his special agent exceeds the limits of his authority. *Koval*, 693 N.E.2d at 1304. Every person who deals with a special agent must ascertain the extent of the agent's authority before dealing with him, because the principal will not be bound by an act of the agent that exceeds the authority that the principal granted to the special agent. *Koval*, 693 N.E.2d at 1304.

3513 Agent—Express Authority

An agent acts within the scope of [her][his][its] express authority when the agent handles business the principal has specifically authorized.

Comments

Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him. *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1302 (Ind. 1998) (citing Restatement 2d Agency § 7). Authority can be express or implied. *Koval*, 693 N.E.2d at 1302 (citing Restatement 2d Agency § 7 cmt. c).

An agency cannot be proved by the declarations of the agent alone. *Storm v. Marsischke*, 159 Ind. App. 136, 304 N.E.2d 840 (1973).

3515 Agent—Implied Authority

By giving the agent express authority, the principal also gives the agent implied authority to use the usual and reasonably necessary methods required to handle the principal's business.

Comments

Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him. *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1302 (Ind. 1998) (citing Restatement 2d Agency § 7). Authority can be express or implied and may be conferred by words or other conduct, including acquiescence. *Koval*, 693 N.E.2d at 1302 (citing Restatement 2d Agency § 7 cmt. c). Implied authority can arise from words used, from customs, or from the relations of the parties. *Koval*, 693 N.E.2d at 1302. The agent is authorized if the agent is reasonable in drawing an inference from the principal's actions that the principal intended to confer authority. *Koval*, 693 N.E.2d at 1302.

An agent may bind the agent's principal as to all matters necessarily incident to execution of the power expressly conferred. *Andonov v. Christoff*, 169 Ind. App. 319, 348 N.E.2d 84 (1976).

Whereas implied authority rests on actual authority and includes powers reasonably necessary to accomplish the purpose of the agency, apparent authority rests on estoppel and exists in the absence of actual authority. 1 I.L.E. Agency §§ 54, 55. See Instruction No. 3517 on apparent authority.

3517 Apparent Authority—Definition

In addition to express and implied authority, an agent may also have apparent authority. “Apparent” means apparent to a third person, that is, someone other than the principal or the agent.

An agent has apparent authority when the principal places the agent in a position to act on behalf of the principal, and a third person reasonably believes that the principal authorized the agent to act.

If the third person reasonably relies on the agent’s apparent authority, the principal is liable to the third person, even if the agent exceeded the authority given to [him][her][it] by the principal.

If, however, the third person knows, or by using reasonable care should have known, that the agent exceeded [his][her][its] authority, the principal is not liable for the agent’s actions.

Reasonable care means being careful and using good judgment and common sense.

Comments

When a special agent appears to be a general agent, a third party has no duty to inquire into his authority, and a principal will not be protected by secret limitations on the authority of the agent. *Yellow Mfg. Acceptance Corp. v. Voss*, 158 Ind. App. 478, 483, 303 N.E.2d 281, 283–84 (1973).

The doctrine of apparent authority is premised in equity, and is based upon the principle that where one of two innocent parties must suffer from the wrongful conduct of an agent, the loss should fall upon the principal, and not the third party, when the principal, by conduct, created the circumstances that caused the third party to suffer the loss. *Grosam v. Laborers’ International Union, Local 41*, 489 N.E.2d 656 (Ind. Ct. App. 1986).

It is critical to the application of the doctrine of apparent authority that the party dealing with the agent reasonably believes that the agent is acting within the scope of authority granted to the agent by the principal; if the third party knows, or should know, the agent is exceeding the agent’s authority, the principal will not be bound. *Storm v. Marsischke*, 159 Ind. App. 136, 304 N.E.2d 840 (1973).

See Instruction No. 3515 cmt. (on the distinction between apparent authority and implied authority).

3519 Independent Contractor as Agent

[The Committee recommends that no instruction be given, because whether a person is an independent contractor is irrelevant to the determination of whether he or she is an agent.]

Comments

The Committee recommends that no instruction be given, because whether a person is an independent contractor is irrelevant to the determination of whether he or she is an agent. To determine if an independent contractor is an agent, the same agency standards apply. While an independent contractor cannot be a servant, and vice versa, they can both be agents. *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142 (Ind. 1999) (citing *Burkett v. Crulo Trucking Co.*, 171 Ind. App. 166, 355 N.E.2d 253 (1976); Restatement 2d Agency § 2).

3521 Principal Sued but Not Agent—Agency Existence Is Not Contested

[Agent] was an agent of [principal] at all times relevant to this lawsuit.
If, within the scope of [his][her][its] authority, [agent] wrongfully acted or failed to act, [principal] is liable for that action or inaction.

Comments

This instruction should be given where the act complained of was committed by the agent and there is no issue about the existence of the agency relationship.
If there is an issue as to whether the relationship of co-defendants was one of agency or joint enterprise, Instruction No. 1311 should be modified and read in conjunction with this instruction.



3523 Principal and Agent Both Sued—Agency Existence Is Not Contested

[Agent] was an agent of [principal] at all times relevant to this lawsuit.

If, within the scope of [his][her][its] authority, [agent] wrongfully acted or failed to act, both [principal] and [agent] are liable for that action or inaction.

If you decide that [agent] is liable, then you must decide that [principal] is liable. However, if you decide that [agent] is not liable, then you must also decide that [principal] is not liable.

Comments

A master's liability cannot exceed that of the master's servant when liability is based solely upon respondeat superior, and in such case, the verdict discharging the servant automatically discharges the master. *Biel, Inc. v. Kirsch*, 130 Ind. App. 46, 153 N.E.2d 140 (1958).

3525 Principal and Agent Both Sued—Agency Denied—Acting in Scope of Authority Denied

If you decide that:

- (1) [agent] was an agent of [principal]; and
- (2) [agent] was acting within the scope of [his][her][its] authority when [describe the occurrence]; and
- (3) [agent] is [liable],

then [principal] is also liable.

If you decide that [agent] is not liable, then [principal] is not liable.

If, however, you decide that [agent] is liable but was not acting [as an agent for the principal][or][within the scope of the agent's authority] when [describe the occurrence], then [principal] is not liable for the acts of [agent].

Comments

The general rule is that a principal is liable to third persons for torts committed by the principal's agent while acting within the scope of the agent's employment. *Miller v. Long*, 126 Ind. App. 482, 131 N.E.2d 348 (1956). The rule applies even though a particular act may have been willful, or unauthorized, or an agent may have failed in the agent's duty to the principal, or may have disobeyed instructions. *Singer Sewing Mach. Co. v. Phipps*, 49 Ind. App. 116, 94 N.E. 793 (1911); *Pittsburgh, C., C. & St. L. Ry. Co. v. Sullivan*, 141 Ind. 83, 40 N.E. 138 (1895).

The converse of the general rule is that the principal is not liable to third persons for torts committed by the agent when the agent is acting outside the scope of the agency. *Cincinnati, H. & I. R. Co. v. Carper*, 112 Ind. 26, 13 N.E. 122 (1887).

The question as to the scope of the authority of an agent is a question of fact and is ordinarily determined by the jury. *Chrysler Corp. v. Bolser*, 102 Ind. App. 310, 200 N.E. 417 (1936); *Diamond v. Cleary*, 88 Ind. App. 518, 162 N.E. 372 (1928), *overruled in part on other grounds by Conway v. Park*, 108 Ind. App. 562, 570 (Ind. Ct. App. 1941). When an agent's authority is conferred and defined in writing, however, the scope of the agent's authority is a question of law for the court. *Modern Woodmen of Am. v. Lyons*, 76 Ind. App. 641, 128 N.E. 651 (1920).

3527 Respondeat Superior—Vicarious Liability

An employer is liable for the [negligent][wrongful] act of its employee done within the scope of [his][her] employment if the act is a responsible cause of the injury to the Plaintiff.

An employee's [negligent][wrongful] act is within the scope of employment when the employee's [negligent][wrongful] act occurred while the employee was performing activities expressly or impliedly authorized by the employer.

The [negligent][wrongful] act need not be intended to serve the employer, nor be authorized by the employer for it to fall within the scope of employment. The [negligent][wrongful] act must come from a course of conduct the employee performs while in the employer's service.

Comments

The determination of whether an employee is acting within the scope of his employment is dependent upon the circumstances of each case and is generally a question of fact for the jury. *Gomez v. Adams*, 462 N.E.2d 212, 223 (Ind. Ct. App. 1984); *Gibbs v. Miller*, 283 N.E.2d 592 (Ind. Ct. App. 1972).

Indiana does not require a plaintiff to prove that an employee's negligent or wrongful act was done with a purpose to serve the employer. Other jurisdictions do require a plaintiff to prove this purpose to serve the master/employer as an element. *See State v. Schallock*, 189 Ariz. 250, 258, 941 P.2d 1275, 1283 (1997); *Iandiorio v. Kriss & Senko Enterprises, Inc.*, 512 Pa. 392, 397–98, 517 A.2d 530, 533 (1986); *Sheldon v. Kettering Health Network*, 2015-Ohio-3268, ¶¶ 14–15, 40 N.E.3d 661, 668–69 (2d. Dist.).

The committee amended vicarious liability instructions in response to *Cox v. Evansville Police Dep't.*, 107 N.E.3d 453 (Ind. 2018):

To be clear, the focus in determining the scope of employment “must be on how the employment relates to the context in which the commission of the wrongful act arose.” *Barnett*, 889 N.E.2d at 285 (quoting *Stropes*, 547 N.E.2d at 249). When tortious acts are so closely associated with the employment that they arise naturally or predictably from the activities an employee was hired or authorized to do, they are within the scope of employment, making the employer liable. *West*, 81 N.E.3d at 1072–73. But tortious acts are not within the scope of employment when they flow from a course of conduct that is independent of activities that serve the employer. *Barnett*, 889 N.E.2d at 283–84.

Cox, 107 N.E.3d at 461.

The court in *Cox* also recognized the special case of a police officer misusing employer conferred power and authority in finding a city liable if the conduct arose naturally or predictably from the officer's employment activities. The reasoning of the court was as follows:

The reason underlying scope-of-employment liability support this conclusion. First, the city benefits from the lawful exercise of police power, so when tortious abuse of that power naturally or predictably flows from employment

activities, the city equitably bears the cost of the victim's loss. *See West*, 81 N.E.3d at 1072–73. And second, holding the city liable encourages it to guard against recurrent assaults. Particularly because cities vest considerable power and authority in police officers, we want cities to exercise vigilance in hiring and supervising officers. *See Waymire*, 114 F.3d at 649.

So the scope-of-employment rule, shaped by its underlying policies, allows employer liability for an officer's sexual assault. We stress that the unique authority that cities vest in police officers drives this conclusion.

Cox, 107 N.E.3d at 463. Additionally, in *Burton v. Benner*, 140 N.E.3d 848 (Ind. 2020), the Indiana Supreme Court held that there was no genuine issue of material fact as to whether a police officer was acting **clearly outside** the scope of his employment when he was operating his police vehicle at the time he was involved in an auto accident. The officer's conduct was the same general nature was authorized by police policy; he was maintaining radio contact, conforming to the dress code and could suddenly be available for official duties. *Id.* at 853.

The following instruction was affirmed in *Walgreen Co. v. Hinchey*, 21 N.E.3d 99 (Ind. Ct. App. 2014):

An employer is liable for the wrongful acts of its employee which are committed within the scope of employment.

An act is within the scope of employment if it is incidental to the employee's job duties, that is to say, the employee's wrongful act originated in activities closely associated with her job.

In deciding whether an employee's wrongful act was incidental to her job duties or originated in activities closely associated with her job, you may consider:

1. Whether the wrongful act was of the same general nature as her authorized job duties;
2. Whether the wrongful act is intermingled with authorized job duties; and
3. Whether the employment provided the opportunity or the means by which to commit the wrongful act.

Id. at 110–111. The definition of “incidental” included in the instruction was derived from *Celebration Fireworks*, 727 N.E.2d at 453; *Wilson v. Isaacs*, 917 N.E.2d 1251 (Ind. Ct. App. 2009), *vacated in part* by 929 N.E.2d 200 (Ind. 2010); *Ellis v. City of Martinsville*, 940 N.E.2d 1197 (Ind. Ct. App. 2011); *Smith v. Ind. Dep't of Corr.*, 871 N.E.2d 975, 986 (Ind. Ct. App. 2007). *Walgreen Co.*, 21 N.E.3d at 110–11. Other cases have included a factor that considers whether the act was done to further the employer's business. *Bushong v. Williamson*, 790 N.E.2d 467, 473 (Ind. 2003). However, the approved instruction did not include whether the act was “to further his employer's business.”

3529 Respondeat Superior—Constructive Knowledge of Employer

Knowledge of [Defendant]'s agent or employee acquired within the scope employment is knowledge of [Defendant], regardless of whether the agent or employee shared [his][her] knowledge with anyone else.

Comments

Southport Little League v. Vaughan, 734 N.E.2d 261, 275 (Ind. Ct. App. 2000):

This court has long recognized that a principal is charged with the knowledge of that which his agent by ordinary care could have known where the agent has received sufficient information to awaken inquiry. *Travelers Ins. Co. v. Eviston*, 110 Ind. App. 143, 37 N.E.2d 310, 316 (1941). We have previously held that knowledge of material facts acquired by an agent in the course of his employment, and within the scope of his authority, is the knowledge of the principal, and where no actual knowledge of the principal is shown, the rule will be given the effect on the theory of constructive knowledge, resting on the legal principle that it is the duty of the agent to disclose to his principal all material facts coming to his knowledge, and upon the presumption that he has discharged that duty. *National Mut. Ins. Co. of Celina, Ohio v. Bales*, 81 Ind. App. 302, 139 N.E. 703 (1923). The Indiana Supreme Court has stated that:

Notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and, if he has not, still, the principal having entrusted the agent with the particular business, the other party has the right to deem his acts and knowledge obligatory upon the principal. *Field v. Campbell*, 164 Ind. 389, 72 N.E. 260, 263 (1904)

CHAPTER 3700

PROPERTY

SYNOPSIS

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Introduction

The power of eminent domain is inherent in and essential to the existence of government. While it does not depend on the existence of a specific constitutional grant, its power is limited by Article I, section 21 of the Indiana Constitution, and its proceedings are governed by Ind. Code art. 32-24 (as reviewed in *Twin Lakes Regional Sewer District v. Teumer*, 992 N.E.2d 744 (Ind. Ct. App. 2013)).

The first part of this chapter consists of a court's instructions to appraisers, rather than to jurors. The instructions in that subchapter have been included, because the determination of damages by a jury necessarily follows an assessment of damages by an appraiser.

The second part of this chapter contains the jury instructions. Indiana Code § 32-24-1-11 requires that a party excepting to the report of the court-appointed appraisers must file written exceptions in the office of the circuit court clerk no later than forty-five days after the date the circuit court clerk mails the report of the appraiser by certified mail. If no exceptions are filed within this time, the report becomes conclusive upon all parties, and the trial court is without jurisdiction to try the issue of damages. *Southern Ind. Gas & Elec. Co. v. Decker*, 261 Ind. 527, 307 N.E.2d 51 (1974); *Samplawski v. Portage*, 512 N.E.2d 456 (Ind. Ct. App. 1987). If exceptions are filed within the time limit, however, the issue of landowner's damages may be submitted to the jury. *State v. Berger*, 534 N.E.2d 268 (Ind. Ct. App. 1989). As the jury's only role is to determine damages, the jury instructions in large part mirror and explain the appraisers' instructions. See Instruction 3703; Ind. Code § 32-24-1-9.

A. Condemnation

3701 Appraiser Instructions—Oath of Appraisers

[Caption]

Oath of Appraisers

We solemnly swear or affirm under the penalties of perjury that we will honestly and impartially assess the damages [and the benefits] the defendant[s] in this case may sustain due to the acquisition of the property described in the complaint and that we have no interest in these condemnation proceedings or in any of the property being condemned by [condemning authority].

John Doe

Richard Roe

Peter Snow

Subscribed and sworn to before me this _____ day of _____.

Clerk of the _____ Court
of the _____ County

Comments

See Ind. Code § 32-24-1-9(a). Ordinarily, the appraisers are instructed at the time they report to take their oath. See Instruction No. 3703. This form is included as a matter of convenience and in the interest of uniformity.

The bracketed reference to “benefits” should be omitted where there can be no possibility of benefits. Benefits may only be assessed in cases brought by the state or by a county for a public highway, or a municipal corporation for a public use. Ind. Code § 32-24-1-9(d)–(f). Also, no benefits could result where there is a taking in fee of the entire estate owned by landowner, for example.

3703 Appraiser Instructions—Instructions to Appraisers

[Caption]

Instructions to Appraisers

1. The property to be appraised is located at _____ in [the City of _____] _____ County, Indiana, and is described as follows: [*Insert legal description of land to be appraised*].
2. You will determine the value of the property as of the _____ day of [*month and year*].
3. You are to appraise the fair market value of each parcel of property being acquired [and the value of each separate estate or interest in the property].
4. You are to appraise the fair market value of all improvements, if any, on the property being acquired.
5. If [*condemning authority*] is taking only a part of the owner[‘s’][s’] property, you are to determine the amount of damages, if any, caused to the residue of that property by the taking.
6. You are to determine the other damages, if any, that will result from construction of the improvements in the manner proposed by the plaintiff.
7. If the property is to be acquired by the state or by a county for a public highway or a municipal corporation for a public use that confers benefits on any property of the owner, your report must state the benefits that will accrue to each parcel of property, set opposite the description of each parcel of property whether described in the complaint or not. You must also deduct benefits assessed from the amount of damage allowed, if any, under Ind. Code § 32-24-1-9(c)(3) and (4) [the damages, if any, to the residue of the property of the owner[s] caused by taking out the part being acquired and the other damages, if any, that will result to any persons from construction of the improvements in the manner proposed by the plaintiff] and the difference, if any, plus the damages allowed under subsection (c)(1) and (c)(2) [the fair market value of each parcel of property being acquired, and the fair market value of all improvements if any, on the property being acquired] will be the amount of the award. However, the damages awarded may not be less than the damages allowed under subsection (c)(1) and (c)(2).
8. “Fair market value” means the price the property would bring after fair and reasonable negotiations between a seller who is willing, but not compelled to sell, and a buyer who is willing and able, but not compelled to buy. Anything affecting the sale value on the date of the taking is a proper matter for your consideration in attempting to arrive at a fair market value.
9. The term “benefits” means the amount that the fair market value of the residue of [any interest in] the property will increase as a natural and proximate result of the construction of the improvements in the manner proposed by [*condemning authority*]. To consider the value of benefits to the residue, the benefits must be substantially greater in degree to the owner than to other owners in the community. Do not consider general benefits to the community at large.

10. The term “damages to the residue” means the amount that the fair market value of the residue of [any interest in] the property will be decreased by the taking and by the construction of the proposed improvements.
11. The fact that [*condemning authority*] has the authority to appropriate the property should not, in any way, affect your assessment of damages.
12. You may use any fair and accepted method to determine the fair market value of the property and improvements and the amount of any damages or benefits.
13. The previous use to which property is put is not the only criteria for measuring its value. In determining the fair market value of the property of the owner, you may consider its past and present use and the highest and best use for which the property is available and can reasonably be adapted at the time of the taking.
14. You may consider recent sales of like or similar property in the area.
15. You may examine such plats, blueprints, drawings and plans prepared by [*condemning authority*] as are necessary to understand the nature and extent of the proposed improvements.
16. You may examine any books and records, and other documents of the property owner that will assist you in determining damages.
17. You should make your report on the form provided by the court, and each of you should sign in the place indicated. You must file your report with the court on or before the _____ day of [month and year].

Judge

Given this _____ day of _____, _____.

Comments

Instruction 2

The value of the property being condemned and the damages, except as to the damages stated in Ind. Code § 32-24-1-9(c)(4), shall be determined as of the date of service of notice provided in Ind. Code § 32-24-1-6. Ind. Code § 32-24-1-9(g).

Instruction 3

Ind. Code § 32-24-1-9(c)(1). The bracketed words should be omitted where there are no divided interests or where a gross sum is apportioned between joint owners by law. For example, in the case of husband and wife (tenancy by the entirety), the bracketed words should be omitted. In the case of landlord and tenant, however, where the tenant is a party-defendant and will suffer damages as a result of the taking, the bracketed words should be included and the appraisers' report form should be modified to reflect the factual situation.

Instruction 5

Added to this instruction is the rule that to award damages for a severance of a single tract there must be unity of title, unity of use, and contiguity. *Mishawaka v. Fred W. Bubb Funeral Chapel, Inc.*, 469 N.E.2d 757, 759 (Ind. Ct. App. 1984).

Instruction 6

Ind. Code § 32-24-1-9(c)(4) obliges appraisers to determine “other damages, if any, that will result to any persons from the construction of the improvements in the manner proposed by the plaintiff.” (Emphasis supplied.) This instruction is based on the statutory language, though it is not apparent the legislature could have intended “any persons” to include entities other than the “owner or owners” the statute refers to in the provision reflected in Instruction 5 above. To avoid confusion to jurors, this distinction is not included in the corresponding jury instruction.

Instruction 7

Where the entire estate of the landowner is taken, this instruction to the appraisers should be omitted.

This instruction clarifies that the “benefits” appraisal applies only in specific situations. See Ind. Code § 32-24-1-9 (d)–(f). It is not clear from the phrase in subsection (d), “by the state or by a county for a public highway,” whether that subsection applies to any condemnation by the state or only to condemnation by the state for a public highway. The language of the prior statute suggests the latter:

In case the land is sought to be taken by the state or by a county, for a public highway or by a municipal corporation for a public use that confers benefits on any lands of the owner, the report shall also state the benefits which will accrue to each parcel of property, set opposite each description of the same, whether described in the complaint or not. In estimating the damages specified in subdivisions (1), (2), (3), and (4), no deduction shall be made for any benefits that may result from such improvement, excepting in case of a condemnation by the state or by a county, for a public highway or by a municipal corporation for public use, the benefits, if any assessed, shall be deducted from the amount of damage allowed, if any, under subdivisions (3) and (4); and the difference, if any, plus the damages allowed under subdivisions (1) and (2) shall be the amount of the award, but in no case shall the damage awarded be less than the damages allowed under subdivisions (1) and (2).

Instruction 9

This instruction should be omitted except in cases involving a condemnation by the state or by a county for a public highway, or by a municipal corporation for public use **and** the plaintiff has alleged “benefits” in the complaint as provided in Ind. Code § 32-24-1-4(b)(5). See Ind. Code § 32-24-1-9.

Instruction 12

The values of comparable pieces of property are recognized as a valid basis for an opinion of the fair market value of another piece of property. *Indiana & Mich. Elec. Co. v. Hurm*, 422 N.E.2d 371, 375 (Ind. Ct. App. 1981).

Note, however, that the price paid by the condemnor for other property is not relevant to show the value of the condemnee's property as it was purchased under the threat of condemnation. *Chambers v. Public Serv. Co. of Ind.*, 265 Ind. 336, 341, 355 N.E.2d 781, 785 (1976); *Unger v. Ind. & Mich. Elec. Co.*, 420 N.E.2d 1250 (Ind. Ct. App. 1981).

Note also that the portion of this instruction dealing with the assessment of benefits may not always be proper. See Instruction 9 cmt.

3705 Appraiser Instructions—Appraisers’ Report

[Caption]

Report of Appraisers

We assess and determine the damages the property owners will sustain as follows:

1. The fair market value of each parcel of property being acquired [and the value of each separate estate or interest in the property].
..... \$_____
2. The fair market value of all improvements, if any, located on the property being acquired.
..... \$_____
3. The damages, if any, to the residue of the property caused by taking of the property being acquired.
..... \$_____
4. Such other damages, if any, as will result to any persons from the construction of the improvements in the manner proposed by [condemning authority].
..... \$_____
- [5. Less benefits that will accrue to (any interest in) the residue of the property caused by the construction of the improvements in the manner proposed by (condemning authority) (not to exceed the damages assessed in Nos. 3 and 4)].
..... \$_____
- Total Damages \$_____

Comments

See Ind. Code § 32-24-1-9.

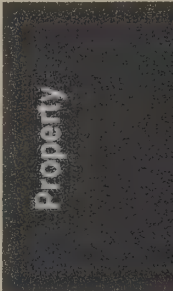
The words contained in brackets in this form should be omitted or modified as the factual situation dictates.

Although not a jury instruction, this form is included because it will necessarily have to be modified to reflect the factual situation in the same manner that the instructions to appraisers are modified or amended. See Instruction No. 3703 cmt.

In the event there are divided interests or proportionate ownership of the property sought, this form will require modification so that the appraisers’ report will show the damages to the respective interests. See Instruction No. 3703 cmt.3.

In some cases, there may be two or more properties sought to be acquired in the same action. In this event, it would appear to be the better practice to have the appraisers assess damages as to each property. This form should be modified by properly identifying each parcel, repeating the items of damage or benefit in the body of the report, and showing a summation of total damages at the end of the report.

Clause 5 should be included in the appraisers’ report only if the land is sought to



be taken by the state or a county for a public highway, or by a municipal corporation for public use and the plaintiff has alleged "benefits" in the complaint as provided in Ind. Code § 32-24-1-4(b)(5). Ind. Code § 32-24-1-9(f).

Benefits can be set off only against damages to the residue (Clause 3 of Ind. Code § 32-24-1-9(c)) and/or other damages (Clause 4). The damages awarded cannot be less than the total of the damages found in Clauses 1 and 2 of the statute. Ind. Code § 32-24-2-1-9(f).

3707 Constitutional Provision

Article 1, Section 21 of the Constitution of Indiana provides in part, “no person’s property shall be taken by law without just compensation.”

Comments

This instruction may be given as a preliminary and a final instruction.

The condemning authority, under Article 1, Section 21 of the Constitution of Indiana, must pay just compensation for condemned real estate. The fundamental purpose of the statutory eminent domain scheme is to ensure that landowners are given just compensation when their property is taken. *Southern Ind. Gas & Elec. Co. v. Russell*, 451 N.E.2d 673 (Ind. Ct. App. 1983). Just compensation is the fair market value of the acquired property at the time of the taking. *Gradison v. State*, 260 Ind. 688, 300 N.E.2d 67 (1973).

The constitutional guaranty as to just compensation for property taken for public use is paramount to any statute, and a statute not in keeping with such guaranty is unconstitutional. *Schnull v. Indianapolis Union Ry. Co.*, 190 Ind. 572, 131 N.E. 51 (1921).

3709 Just Compensation—Defined

“Just compensation” means the amount of money that returns the property owner to the financial position [he][she][they] would have been in had the property not been taken.

Comments

This instruction may be given as a preliminary and a final instruction.

This instruction was patterned after the definition of “just compensation” in *United States v. Miller*, 317 U.S. 369, 373 (1943). Such compensation is “the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.”

As a general rule, in determining the amount of damages in an eminent domain action, all of the landowner’s interests “in the rights in real estate” are compensable, including rights of ingress, egress, and air space. *Weldon v. State*, 258 Ind. 143, 147, 279 N.E.2d 554, 556 (1972). But interests other than those in the real estate are not. For example, a loss in profits by reason of a reduction in traffic alone is not compensable. *Weldon*, 279 N.E.2d at 556.

3711 Residue of the Property—Defined

The “residue of the property” means the part of the property that the owner retains after the taking, when the land that was taken is part of a larger tract. “Damages to the residue” means the decrease in value of the property left after the taking.

Comments

See *State v. Stefaniak*, 250 Ind. 631, 637, 238 N.E.2d 451, 454 (1968) (any error in using the term “residue” was invited error), *disapproved of in part by Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570 (Ind. 2007) (disapproving *Stefaniak*’s formulation of compensable actions).

Property

3713 Issues—Preliminary Instruction

This case involves the taking of [*property owner*]'s property by [*condemning authority*] for [*insert the purpose of the taking*]. I have already decided that [*condemning authority*] can take the property. What you must decide is the amount of damages, if any, [*property owner*] is entitled to recover because of the taking.

Comments

This instruction should be read to the jury in the preliminary instructions only.

The instruction should be modified as the facts dictate. The name of the condemning authority should be inserted as indicated, and the nature of proposed improvements should be set out generally.

Ind. Trial Rule 51(A) requires the trial court instruct the jury as to the issues for trial. In eminent domain cases this instruction should be used in lieu of Instruction No. 109 (preliminary instruction). Instruction Nos. 115 and 117 (preliminary instructions) should be read to the jury following the reading of this instruction.

3715 Burden of Proof

[*Property owner*] must prove by the greater weight of the evidence the value of the damage to the property caused by the taking.

[(*Condemning authority*) must prove by the greater weight of the evidence the value of any benefits to the property caused by the taking.]

Comments

It is recommended that this instruction be read to the jury as a preliminary instruction and reread with the final instructions. Because most condemnation cases do not involve benefits, the second sentence of this instruction (on benefits to the property) has been bracketed. That sentence should only be given when the issue of benefits actually arises in the case, and then usually as a final instruction.

In an eminent domain proceeding where the issue is the amount of damages, the burden of proving damages is on the condemnee. *Van Sickle v. Kokomo Water Works Co.*, 239 Ind. 612, 158 N.E.2d 460 (1959). It logically follows that the burden of proving benefits and their value is on the condemnor. *Gradison v. State*, 260 Ind. 688, 300 N.E.2d 67, 75 (Ind. 1973).

3717 Damages—Date of Taking

[Condemning authority] took [property owner]'s property on [insert date]. You must determine the value of the property taken and other damages, if any, as of that date.

Comments

Indiana Code § 32-24-1-9(g) provides the value of the land taken is determined as of the date of service of notice to the landowners. *State v. Innkeepers of New Castle, Inc.*, 271 Ind. 286, 392 N.E.2d 459 (1979); *Lake Station v. Rogers*, 500 N.E.2d 235 (Ind. Ct. App. 1986).

The basic measure of damages in eminent domain cases is the fair market value of the property at the time of the taking. *Southtown Props., Inc. v. Fort Wayne*, 840 N.E.2d 393, 400 (Ind. Ct. App. 2006). Anything affecting the sale value on the date of the taking is a proper matter for the jury's consideration in attempting to arrive at a fair market value. *Southtown Props., Inc.*, 840 N.E.2d at 400. Generally, all facts an ordinarily prudent person would take into account before forming a judgment as to the market value of property he contemplates purchasing are relevant and material. *Southtown Props., Inc.*, 840 N.E.2d at 400.

3719 Damages—Statute

[Property owner(s)][are][is] entitled to the following damages:

- (1) The fair market value of the property that was taken;
- (2) The fair market value of all buildings or other improvements located on the property that was taken;
- (3) Damages, if any, to the residue of the property caused by the taking; and
- (4) Other damages, if any, resulting from the construction of the improvements in the manner proposed by [condemning authority].

The damages you award must be based on the evidence and not on guess, speculation, or your independent knowledge of property values.

[If you decide that the taking benefits the property, deduct the value of the benefit from the total of elements (3) and (4). You may not, however, reduce the damages to an amount less than the sum of elements (1) and (2). I have attached a worksheet to guide you through this process.]

Comments

The bracketed paragraph should only be given if the taking will be used for a public highway or by a municipal corporation for a public use. Ind. Code § 32-24-1-9(d)–(f). If the court gives the bracketed paragraph, it should also attach Instruction No. 3733 to this instruction.

This instruction paraphrases Ind. Code § 32-24-1-9(c)(1)–(4). The statute itself is technical, and courts have frequently interpreted it.

The determination of the fair market value of condemned property is a question of fact for the jury to determine. *State v. Jordan Woods, Inc.*, 248 Ind. 208, 225 N.E.2d 767 (1967). Where there is a conflict in the evidence as to that value, the jury performs its proper function by considering the evidence and arriving at its verdict. *Derloshon v. Fort Wayne*, 250 Ind. 643, 238 N.E.2d 659 (1968).

The jury may not base its verdict upon its independent knowledge of values; rather its assessment must be supported by evidence presented at trial or it cannot stand. *Gradison v. State*, 260 Ind. 688, 300 N.E.2d 67 (1973).

The last paragraph of the former instruction has been deleted and is addressed in Instruction No. 3733. That paragraph stated “If you find that the taking confers a benefit on the landowner’s property, you should deduct the value of that benefit from elements 3 and 4. However, you may not reduce the damages to an amount less than the sum of elements 1 and 2.” That statement was inaccurate, or at least overbroad, as benefits may be deducted only in certain situations addressed in Instruction No. 3733. Ind. Code § 32-24-1-9(e)–(f).

This instruction will need to be modified to fit the facts of each particular case. For example, where there has been a taking in fee of all of the landowner’s property, there will be no need to read into the instruction Item 3 (damages to residue), the definition of “residue,” or the deduction for benefits conferred, which is now addressed in Instruction No. 3733.

Item 4 has been given a very limited and narrow construction. Consequential damages in general and moving or relocation expenses are not compensable. *State v. Heslar*, 257 Ind. 307, 274 N.E.2d 261 (1971); *Newburgh v. Pecka*, 609 N.E.2d 1152 (Ind. Ct. App. 1993).

[T]he fourth element of damages in the statute was intended to recompense a person for damages resulting from the method of construction in a physical sense. The statute states that it applies to damages which result from the "construction of the improvements in the manner proposed" It is intended to cover such conditions as a total denial of access due to the method of construction. It was not intended to cover any or all consequential damages of any kind Our policy should not be such as to place an undue burden upon the State in acquiring land for such public improvements as highway construction when such improvements are considered to be in the public interest. Allowance of such remote and highly speculative items as loss of business or profits would do just that.

Heslar, 274 N.E.2d at 266.

To award damages for a severance of a single tract there must be unity of title, unity of use, and contiguity. For a discussion on the contiguity requirement, whether it requires actual physical contiguity and when noncontiguous property may be considered "residual property" for the recovery of damages to residue, see *Mishawaka v. Fred W. Bubb Funeral Chapel, Inc.*, 469 N.E.2d 757 (Ind. Ct. App. 1984), *reh'g denied*, *trans. denied*. There the property owner sought to recover residual damages to his funeral home property after the city had condemned his business warehouse property located two blocks away from the funeral home. The Court of Appeals found that separate parcels may be treated as one tract if the parcels are put to an integrated use so inseparably entwined that the taking of one necessarily injures the other. 469 N.E.2d at 761.

Only such matters as actually affect the present or prospective value of the land are proper; no contingent, remote, or speculative damages may be considered. *Lake Station v. Rogers*, 500 N.E.2d 235 (Ind. Ct. App. 1986).

A sample verdict form is available at Verdict Form 5033.

3721 Juror Worksheet

(1)	The fair market value of the property that was taken		\$ _____
(2)	The fair market value of all buildings or other improvements located on the property that was taken	+	\$ _____
(A)	Total of (1) plus (2)	=	\$ _____

(3)	Damages, if any, to the residue of the property caused by the taking		\$ _____
(4)	Other damages, if any, resulting from the construction of the improvements in the manner proposed by [condemning authority]	+	\$ _____
(5)	The value of the benefit to the property of the taking	-	\$ _____
(B)	Total of (3) plus (4) minus (5)	=	\$ _____
NOTE: If (B) is a negative number (in other words, if (5) is more than the total of (3) plus (4)), enter zero in line (B) above.			

TOTAL DAMAGES are equal to (A) plus (B)		=	\$ _____
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Comments

This worksheet should only be submitted to the jury with Instruction No. 3719 if the taking will be used for a public highway or by a municipal corporation for a public use. See Ind. Code 32-24-1-9.

The Committee has determined that this worksheet should be treated like a demonstrative instruction or juror notes. It is to assist the jury in deciding the amount of its verdict, but is not a verdict form. When individual jurors or the jury as a whole completes the worksheet, it will not be submitted to the court as a verdict, become part of the record, or be viewable by the attorneys or parties in the case.

A sample verdict form is available at Verdict Form 5033.

3723 Fair Market Value—Defined

“Fair market value” means the price the property would bring after fair and reasonable negotiations between a seller who is willing, but not compelled to sell, and a buyer who is willing and able, but not compelled to buy.

Comments

The basic measure of damages in eminent domain cases is the fair market value of the property at the time it is taken. *State v. Bishop*, 800 N.E.2d 918, 923 (Ind. 2003). Fair market value is the price at which property would change hands between a willing buyer and willing seller, neither being under any compulsion to consummate the sale. *Bishop*, 800 N.E.2d at 923. Anything affecting the sale value on the date of the taking is a proper matter for the jury’s consideration in attempting to arrive at a fair market value. *Bishop*, 800 N.E.2d at 923.

3725 Damages—Highest and Best Use

To decide the fair market value of the property, you should consider the highest and best use for which the property is available and to which it can reasonably be adapted at the time of the taking. A property's "highest and best use" is the use that will bring the highest dollar amount of return over time. The property's use at the time of the taking might not be the "highest and best use," as it might not be the most valuable use of the property.

Comments

The highest and best use to which land could reasonably be devoted immediately before the taking is the criterion for determining its value at that time. *State v. Peterson*, 269 Ind. 340, 381 N.E.2d 83 (1978). Highest and best use is the legal use of land or buildings that will bring the greatest economic return over time. Black's Law Dictionary 728 (6th ed. 1990). As used in condemnation law, the highest and best use is the legal use that will bring the highest dollar amount of damages. *Gary v. Belovich*, 623 N.E.2d 1084, 1088 n.3 (Ind. Ct. App. 1993).

Uses to which the land is adapted but to which it is not currently put may be considered in determining the highest and best use. *Ind. & Mich. Elec. Co. v. Hurm*, 422 N.E.2d 371 (Ind. Ct. App. 1981). A landowner is entitled to the value of the property at its highest and best use, not necessarily the use to which it is presently being put. *Carmel v. Leeper Elec. Servs.*, 805 N.E.2d 389, 396 (Ind. Ct. App. 2004). An owner might not, at the time of an appropriation, be using his property for the most valuable use to which it is naturally adapted. *Taylor-Chalmers, Inc. v. Board of Comm'rs*, 474 N.E.2d 531 (Ind. Ct. App. 1985). When the land taken has a fair market value at the time of its appropriation, the measure of damages is the fair market value for which the land could be sold if the owner was willing to sell. *Terre Haute*, 238 N.E.2d at 461. If the land has a higher market value by reason of use or uses to which it may be adapted but to which it has not been put, the owner is entitled to the greater value. *Terre Haute*, 238 N.E.2d at 461. But while the highest and best use to which the property was adaptable at the time of the taking may be considered in arriving at fair market value, an owner cannot recover damages for an intended specific use of property to arise in the future. *Terre Haute*, 238 N.E.2d at 461. In *Terre Haute*, the State took land for a highway. The City was planning to use the land for a sewage treatment plant. Our Supreme Court held the City should be compensated for planning and engineering work actually performed before the day of taking. But other expenses for which the City sought compensation, such as extension of a water main, the increased diameter of the water main, the bends around the bridge foundation, and the highway permits, were not compensable because they would arise after the day of the taking.

3729 Damages—Loss of Access

You may award damages to a property owner for loss of access to the property, but only when the loss of access is special and unique to that property and not the inconvenience suffered by the general public.

You may only award loss of access damages if the loss of access deprives the property owner of all or substantially all economic or productive use of the property at its highest and best use.

If, after the loss of access, the property was still suitable for a less valuable use, you may award damages that reflect the reduced value of the property.

Comments

To recover damages, a property owner deprived of access to the property must suffer a particular private injury and not merely an inconvenience or annoyance. This is true even though an individual may suffer an inconvenience or annoyance to a greater degree than the general public. *State v. Dunn*, 888 N.E.2d 858 (Ind. Ct. App. 2008); *State v. Ensley*, 240 Ind. 472, 164 N.E.2d 342 (1960).

In *Dunn*, the State erected a median that the landowner alleged completely eliminated all access to his hotel from the southbound lane of the road, because it prevented all left-hand turns from the southbound lanes that road into the hotel's vehicular entrance. The Court of Appeals held that the construction of the median that caused traffic traveling to and from an abutting property to travel a circuitous route did not constitute a compensable taking under Indiana eminent domain law.

Likewise, in *State v. Kimco of Evansville, Inc.*, 902 N.E.2d 206 (Ind. 2009), the State appropriated a strip of land from a shopping center to widen a road. The State also made roadway improvements that preserved existing points of ingress and egress to the shopping center but affected traffic flow, thereby restricting access to those points. The Indiana Supreme Court held that, while the owners were entitled to compensation for the strip of land, they were not entitled to consequential damages from the street reconfigurations. The Court noted that the condemnation did not eliminate either of the property's existing access points or deprive the owners of their rights of ingress or egress. The only substantive allegation was that traffic flow to the shopping complex had been encumbered. Because no property right was taken, those consequences from the State's roadway improvements were not compensable. The fact that the reconfiguration occurred concurrently with the taking of the strip of land was of no matter, as the taking and coincident roadway improvements were distinct actions.

While the loss of access must be special and peculiar to the property in question to be compensable, the loss does not have to be total so long as there is a substantial and material impairment to the right of access. *State v. Diamond Lanes, Inc.*, 251 Ind. 520, 242 N.E.2d 632 (1968); *State v. Raymond E. Heinold Family Trust*, 484 N.E.2d 595 (Ind. Ct. App. 1985).

In *State v. Peterson*, 269 Ind. 340, 381 N.E.2d 83, 84 (1978), the Indiana Supreme Court held an instruction that mirrored the prior version of this instruction, "Loss of access is compensable and may be considered by you in determining the

damages to be awarded the defendants only when such loss of access is special and peculiar to this property, and only when no other reasonable means of access is available to the property" was properly refused:

Where the issues in the case include a dispute as to the highest and best use or diminished value for that use, the concept that there is no compensable injury unless "no other reasonable means of access is available," to be correct, must contemplate reasonableness in terms of the highest and best use of the property immediately prior to the take.

The highest and best use to which land could reasonably be devoted immediately before the "take" is the criteria for determining its value at that time. If the access to which the owner was then lawfully entitled was necessary in order to so use the land, and that access is denied by the "take," the owner is entitled to be compensated, regardless of the availability of other access that may be "reasonable" for other purposes but does not fulfill the need critical to the coveted use.

The instruction is proper only if it is interpreted to mean that reasonableness of the other means of access must relate to the highest and best use for which the land was reasonably suited. The deficiency in the instruction lies in its susceptibility to having the phrase "other reasonable means of access" misunderstood. To avoid such misconstruction, it should have included a caveat like or similar to the following:

"Other reasonable means of access," as used in this instruction, does not mean access that is reasonable for some other use of the land. Rather, it refers to other access that will permit the land to be used for that purpose regarded as its highest and best use immediately before the take.

3731 Damages to Residue

When only part of an owner's property is taken, the damages must include the fair market value of the land that was taken, and any damage to the rest, or "residue," of the property.

[For there to be damages to the residue, three conditions must be met: (1) The residue must be under the same ownership as the parcel taken, (2) the two parcels must be adjoining, and (3) the parcels must have been used by the property owner in the same way.]

Damage to the residue is the difference between the fair market value of the residue before the taking and the fair market value after the taking.

Comments

Just compensation in cases involving a partial taking is generally the fair market value of the property taken plus all the damages that the residue suffers, including the diminution of the fair market value of the remainder. *Unger v. Ind. & Mich. Elec. Co.*, 420 N.E.2d 1250 (Ind. Ct. App. 1981). Before severance damages may be awarded, however, three conditions must be met: (1) simultaneous unity of title, (2) unity of use, and (3) contiguity. *State v. Church of Nazarene*, 268 Ind. 523, 377 N.E.2d 607 (1978); *Mishawaka v. Fred W. Bubb Funeral Chapel, Inc.*, 469 N.E.2d 757, 759 (Ind. Ct. App. 1984).

This instruction should be given only when there is a partial taking of a tract of land. The bracketed sentence should be given only if the condemning authority challenges one of the three conditions.

3733 Benefits to Residue

To consider the value of benefits to the residue, the benefits must be substantially greater in degree to the owner than to other owners in the community. Do not consider general benefits to the community at large.

Comments

By statute, benefits may be deducted or set off against damages only in the case of condemnation by the state or by a county for a public highway, or by a municipal corporation for a public use (Ind. Code § 32-24-1-9(d)–(f)), **and** the plaintiff has alleged “benefits” in the complaint as provide in Ind. Code § 32-24-1-4(b)(5).

In addressing the distinction between special benefits, which are deductible from the damages suffered by the landowner as a result of the taking, and general benefits, which are not deductible, the Indiana Supreme Court observed:

The law is clear in Indiana that where benefits to the residue are deductible from the compensation allowable for damages thereto, the benefits must be special to the property in question. *State v. Ahaus*, 223 Ind. 629, 63 N.E.2d 199 (1945); *State v. Smith et ux*, 237 Ind. 72, 143 N.E.2d 666 (1957). What is not so clear is what is meant by ‘special benefits’ as opposed to ‘general benefits.’ We believe, however, that the landowner seeks to place too narrow an interpretation upon those benefits to be considered as ‘special.’ To be direct or peculiar to an owner, a benefit does not have to be unique to him, and a benefit otherwise qualifying as ‘special’ is deductible, notwithstanding that some or all of the other property adjacent to the improvement is also benefited. In *Herndon v. Pulaski County*, 196 Ark. 284, 117 S.W.2d 1051 (1938), *cert. denied*, 305 U.S. 642, it was held that where other owners, no portion of whose lands had been taken for the new road, received the same benefits which the plaintiff derived, this did not prove that the plaintiff had not received special benefits to her land. The topic is annotated at 13 A.L.R.3d 1168 et seq. and leads to the conclusion that the comparison is not to be made merely with other lands directly affected by the project but with the general community benefited thereby, and that if the benefits to a particular affected owner were substantially greater in degree than those accruing to the other landowners in the community, he will be held chargeable with the excess benefits he enjoys, as an offset to his damages. Whether or not the benefits are held to be ‘special’ or ‘general’ then, to a large extent must be determined by the circumstances of each case. This liberalized view is entirely consistent with the equities, for the theory supporting damages in eminent domain is that a landowner is entitled to just compensation—not to a windfall at the expense of the public.

Gradison v. State, 260 Ind. 688, 695–96, 300 N.E.2d 67, 74 (1973).

B. Trespass

3741 Trespass—Landowner as Plaintiff—Definition

Trespass is the unauthorized entry [on][in][under][over] the land of another.

To recover damages from [defendant], [plaintiff] must [prove][have proven] each of the following by the greater weight of the evidence:

- (1) [plaintiff][was in][had the right to] lawful possession of the land; and
- (2) [defendant][was a trespasser][trespassed][on][in][under][over] the property [owned][occupied] by [plaintiff].

Comment

See Instruction No. 1913; see also *Conner v. Woodfill*, 126 Ind. 85, 25 N.E. 876 (1890); *Cullison v. Medley*, 570 N.E.2d 27 (Ind. 1991) (abrogated with regard to intentional infliction of emotional distress); *B&B, LLC v. Lake Erie Land Co.*, 943 N.E.2d 917 (Ind. Ct. App. 2011).

3743 Trespass—Landowner as Plaintiff—Damages

If you decide from the greater weight of the evidence that [*defendant(s)*][is][are] liable for trespass to [*plaintiff*]'s real estate, you must decide the amount of money that will fairly compensate [*plaintiff*].

[For damage to real estate, use Instruction No. 717.]

[For damage to real property due to environmental contamination, use Instruction No. 719.]

[For damage to personal property, use Instruction Nos. 721–23.]

[If you find that the trespass resulted in the destruction or removal of products of the land, damages are the value of the product without any deduction for labor or expense for removing and preparing the product for market.]

Every trespass is considered to result in injury, and therefore, [*plaintiff*] is entitled to at least nominal damages. Nominal damages are a token amount, insignificant in relation to the case.

Comments

Every trespass to real property is considered to result in legal injury, entitling the plaintiff to at least nominal damages. *Hawke v. Maus*, 141 Ind. App. 126, 226 N.E.2d 713 (1967).

The measure of damages in a trespass action is such sum as will compensate the person injured for the loss sustained. *Wright v. Reuss*, 434 N.E.2d 925 (Ind. Ct. App. 1982).

The measure of damages is the difference in value of the land before the alleged trespass and injury and immediately thereafter. Where the action is for the value of willfully destroyed or removed products of the land, the measure of damages is the market value of the product. *Levin v. Schuckman*, 150 Ind. App. 254, 276 N.E.2d 208 (1971).

The appropriate measure of damages for temporary injury to real property is cost of restoration. *Terra-Prods. v. Kraft Gen. Foods*, 653 N.E.2d 89 (Ind. Ct. App. 1995), trans. denied.

Additional elements of damage should be added if appropriate.

3744 Damage to Real Property Due to Environmental Contamination

If you decide from the greater weight of the evidence that [*defendant(s)*][*is*][*are*] liable for damage to [*plaintiff's*][*plaintiffs'*] real estate due to environmental contamination, you may award damages for both the cost to repair the real estate and any reduction in its fair market value remaining after the repair.

Comments

There can be significant departures from the general standard for damage to real property depending upon the nature of the injury and the type of property. *See, e.g., Terra-Prods. v. Kraft Gen. Foods*, 653 N.E.2d 89 (Ind. Ct. App. 1995) (because remediation of environmentally contaminated land was exorbitant, the Court adopted a hybrid theory of recovery that used both the cost of repair and any reduction in the property's value after repair).

C. Nuisance**3751 Nuisance—Definition**

A nuisance is [harmful to health][indecent][offensive to the senses][or][obstructs the free use of property]. A nuisance is the interference with the comfortable enjoyment of life or property, based on the judgment of a reasonable person.

Comments

See Instruction No. 719; *see also* Ind. Code § 32-30-6-6, *Samples v. Wilson*, 12 N.E.3d 946 (Ind. Ct. App. 2014); *Davoust v. Mitchell*, 146 Ind. App. 536, 257 N.E.2d 332 (1970).

3753 Nuisance—Elements and Burden of Proof

To recover on the nuisance claim, [plaintiff] must prove the following by the greater weight of the evidence:

1. [defendant][describe the condition created by defendant or defendant's conduct];
2. the [describe the condition or conduct] was [harmful to health][indecent][offensive to the senses][or][obstructs the free use of property];
3. the [describe the condition or conduct] would interfere with a reasonable person's comfortable enjoyment of life or property; and
4. the [describe the condition or conduct] was a responsible cause of [plaintiff]'s damages.

Comments

See Instruction No. 719; see also Ind. Code § 32-30-6-6, *Samples v. Wilson*, 12 N.E.3d 946 (Ind. Ct. App. 2014); *Davoust v. Mitchell*, 146 Ind. App. 536, 257 N.E.2d 332 (1970).

3755 Nuisance—Damages

If you decide from the greater weight of the evidence that [*defendant*] is liable to [*plaintiff*] for nuisance, then you must decide the amount of money that will fairly compensate [*plaintiff*].

In deciding the amount of money you award, you may consider:

- (1) the annoyance and disruption in [*plaintiff*]'s use and enjoyment of the property for the duration of the nuisance, and;
- (2) the permanent or temporary damage to the real estate caused by the nuisance.
 - a. Damage to the real estate is temporary when the cost to [eliminate the nuisance][restore the real estate] is less than its fair market value immediately before the damage. If you decide that the damage to the property caused by the nuisance is temporary, you may award the cost of remediation plus loss of use measured by the reduction of the fair market rental value of [*plaintiff*]'s real estate affected by the nuisance.
 - b. Damage to the real estate is permanent if the nuisance cannot be eliminated or if the cost to [eliminate the nuisance][restore the real estate] is more than its fair market value immediately before the damage. If you decide that the damage to the real estate is permanent, you may award the difference between the fair market value of the real estate immediately before and after the nuisance.

Comments

See Instructions Nos. 703, 717, and 719.

The measure of damages in a nuisance action is compensation for the harm suffered by the plaintiff, taking into consideration all losses caused by the nuisances. *Northern Ind. Pub. Servs. Co. v. W.J. & M.S. Vesey*, 210 Ind. 338, 200 N.E. 620 (1936).

Where the damages to the real estate resulting from a nuisance is permanent, the measure of damages is the diminution in the value of property. *Northern Ind. Pub. Servs. Co. v. W.J. & M.S. Vesey*, 210 Ind. 338, 200 N.E. 620 (1936).

However, where the damage is temporary or remediable, the measure of damages is not the depreciation in the value of the property but the depreciation in the rental value during the continuance of the damage. The same rule obtains if the nuisance has been abated prior to the trial. *Northern Ind. Pub. Servs. Co. v. W.J. & M.S. Vesey*, 210 Ind. 338, 200 N.E. 620 (1936).

Where an injury to land is temporary, remediation of the property will fully compensate the owner of the property of his or her injury. *Weddell v. Hapner*, 124 Ind. 315, 24 N.E. 368 (1890).

D. Conversion

3761 Conversion—Definition

Conversion is the unauthorized control over the property of another.

It does not matter if [defendant] intended to exercise control over the property of another or if [defendant] knew [he][she][it] was exercising control over the property of another.

[It is not a defense that the [defendant] acted [in good faith][with mistaken belief of ownership or authorization] in exercising unauthorized control of [plaintiff]'s property.]

Comments

Some claims of conversion may support relief under the Crime Victim's Relief Act (CVRA). Ind. Code § 34-24-3-1. Conversion that gives rise to a claim under the CVRA requires the unauthorized control over the property be knowing or intentional. The tort of conversion does not require mens rea and good faith is not a defense. *Schrenker v. State*, 919 N.E.2d 1188, 1193 (Ind. Ct. App. 2010); *Burras v. Canal Constr. & Design Co.*, 470 N.E.2d 1362, 1368 (Ind. Ct. App. 1984); *Howard Dodge & Sons, Inc. v. Finn*, 181 Ind. App. 209, 391 N.E.2d 638, 641 (1979).

3763 Conversion—Elements

To recover on this claim, [plaintiff] must prove by the greater weight of the evidence:

1. [Defendant] exercised control over the property of the [plaintiff];
2. [Plaintiff] did not authorize [defendant] to exercise control over the property;
3. [Plaintiff] was damaged; and,
4. [Defendant's] unauthorized exercise of control over the property was a responsible cause of [plaintiff]'s damages.

Comments

Some claims of conversion may support relief under the Crime Victim's Relief Act (CVRA). Ind. Code § 34-24-3-1. Conversion that gives rise to a claim under the CVRA requires the unauthorized control over the property be knowing or intentional. The tort of conversion does not require mens rea and good faith is not a defense. *Schrenker v. State*, 919 N.E.2d 1188, 1193 (Ind. Ct. App. 2010); *Burras v. Canal Constr. & Design Co.*, 470 N.E.2d 1362, 1368 (Ind. Ct. App. 1984); *Howard Dodge & Sons, Inc. v. Finn*, 181 Ind. App. 209, 391 N.E.2d 638, 641(1979).

3765 Conversion—Damages

[Use personal property damage instructions found in Instruction Nos. 721 and 723.]

Comment

Instructions for damages resulting from the tort of conversion would be the same instructions for damages to personal property.

E. Crime Victims Relief Act

3771 Crime Victims Relief Act—Elements—Burden of Proof

[Name of crime at issue] is defined by law as follows:
[Definition of crime at issue as contained in the corresponding criminal jury instruction].

Before you may find the Defendant has committed [name of crime at issue], the burden of proof is on the Plaintiff to prove each of the following by the greater weight of the evidence:
[Here list elements of the crime at issue as listed in the corresponding criminal jury instruction on that crime].

Comments

Ind. Code § 34-24-3-1 states in part that if a person has an unpaid claim on a liability that is covered by Ind. Code ch. 24-4.6-5 or suffers a pecuniary loss as the result of a violation of Ind. Code art. 35-43, Ind. Code § 35-42-3-3, Ind. Code § 35-42-3-4, or Ind. Code ch. 35-45-9, the person may bring a civil action against the person who caused the loss.



3773 Crime Victims Relief Act—Damages

In the event that you determine that [plaintiff] has proven by a greater weight of the evidence that [defendant] committed [insert the criminal act alleged], you must determine the amount of money that will fairly compensate [plaintiff].

In deciding the amount of money you award, you may consider the amount of [plaintiff]'s monetary loss as a result of the [insert the criminal act alleged].

If you award [plaintiff] actual damages, you may also award an amount not to exceed two (2) times the actual damages of [plaintiff] as additional damages to punish [defendant] for [his/her/its][insert the criminal act alleged].

The total amount of damages you award may not be greater than three times the actual damages sustained by [plaintiff].

Comments

Pursuant to the Crime Victim's Relief Act (CVRA), Ind. Code § 34-24-3-1, victims of certain enumerated crimes may be entitled to recover exemplary damages, attorney fees and various costs in addition to any pecuniary loss sustained by the victim.

The victim of any crime enumerated in Ind. Code § 34-24-3-1 may bring a civil action to recover any pecuniary damages suffered and exemplary damages as well as attorney fees and costs.

A criminal conviction of the underlying crime is not required in order to recover under the provisions of the CVRA. A plaintiff need only prove by a greater weight of the evidence each of the elements of the crime for which the plaintiff seeks recovery. *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 334 (Ind. 2013). The CVRA requires that a plaintiff prove a pecuniary loss as a result of the crime in order to recover exemplary damages, attorney fees and costs. *Schmidt v. Ind. Ins. Co.*, 45 N.E.3d 781, 785 (Ind. 2015). *See Coleman v. Coleman*, 949 N.E.2d 860 (Ind. Ct. App. 2011) (plaintiff not entitled to the award for attorney fees under the CVRA when the jury awarded plaintiff \$0 pecuniary damages for an alleged theft). Mental anguish and emotional damages are not pecuniary damages for purposes of the CVRA. *Seifert v. Bland*, 587 N.E.2d 1317 (Ind. 1992); *Ash v. Chandler*, 530 N.E.2d 303 (Ind. Ct. App. 1988).

When a plaintiff pleads multiple theories of liability, *see Wysocki v. Johnson*, 18 N.E.3d 600 (Ind. 2014); *Staggs v. Buxbaum*, 60 N.E.3d 238, 247–48 (Ind. Ct. App. 2016).

The finder of fact has discretion in deciding whether to award exemplary damages and the amount. *Wysocki v. Johnson*, 18 N.E.3d 600, 605 (Ind. 2014).

If the trier of fact determines that the CVRA is applicable, an award of attorney fees and the enumerated costs are mandatory. *Id.*, citing *Browning v. Walters*, 616 N.E.2d 1040, 1045–46 (Ind. Ct. App. 1993), *adhered to on reh'g*, 620 N.E.2d 28 (Ind. Ct. App. 1993). The court determines the amount of attorney fees and the costs to be awarded. *Cavallo v. Allied Physicians of Michiana, LLC*, 42 N.E.3d 995 (Ind. Ct. App. 2015).

Any amount of attorney fees and costs awarded pursuant to the CVRA are not to be included in determining the amount of exemplary damages awarded pursuant to subsection (1). *Harco, Inc. of Indianapolis v. Plainfield Interstate Family Dining Assocs.*, 758 N.E.2d 931, 945 (Ind. Ct. App. 2001).

CHAPTER 3900

WILL CONTEST

SYNOPSIS

- 3901 Action to Contest or Resist Probate of a Will—Issues for Trial—Burdens of Proof
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- 3911 Undue Influence—Definition
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- 3917 Requirements of Due Execution—Nuncupative (Oral) Will
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3901 Action to Contest or Resist Probate of a Will—Issues for Trial—Burdens of Proof

[*Plaintiff(s)*] claim[s] that the document at issue should be set aside, because [*insert a brief statement of the basis for the claim, e.g., the instrument was not executed in the manner required by statute, the decedent lacked sound mind at the time the instrument was made, etc.*]

[*Plaintiff(s)*] must prove [*his*][*her*][*their*] claims by the greater weight of the evidence.

[*Defendant(s)*] den[ies][y][*insert aspects of plaintiff's claims that defendant denies*].

[*Defendant(s)*][is][are] not required to disprove [*plaintiff('s)(s')*] claims.

Comments

This instruction should be given as a preliminary instruction and may also be read as a final instruction. *See* Instruction No. 109 cmt. It is recommended in will instructions that the words “written instrument” be used instead of “pretended will” or a similar phrase, because “pretended will” might suggest the opinion that the will in controversy is invalid.

An action to set aside a will is, of right, triable by jury. *Lamb v. Lamb*, 105 Ind. 456, 5 N.E. 171 (1886).

A party may file an action to resist a will's probate or to test the validity of a will after probate, but only to claim that the will is not the will of the testator. *Renner v. Hanna*, 186 Ind. 43, 114 N.E. 976 (1917); *Summers v. Copeland*, 125 Ind. 466, 25 N.E. 555 (1890), *questioned on other grounds by McCoy v. Like*, 511 N.E.2d 501 (Ind. Ct. App. 1987). Other claims may not be raised in that type of action and, unless the will discloses that no part of it is valid and the instrument is void in all its provisions, the court has no authority to construe the will. *Renner*, 186 Ind. 43. The party contesting the will bears the burden of proof in suits to resist probate or test the will's validity. Ind. Code § 29-1-7-20; *see also Arnold v. Parry*, 173 Ind. App. 300, 363 N.E.2d 1055 (1977).

After a will has been probated, only a will contest brought within the time and upon the grounds prescribed by statute can question of the validity of the instrument or its execution. *In re Estate of Niemiec*, 435 N.E.2d 999 (Ind. Ct. App. 1982); *Cook v. Loftus*, 414 N.E.2d 581 (Ind. Ct. App. 1981).

Will contests are purely statutory, and while formal pleadings may be filed, they are unnecessary; statute provides that an action is instituted by filing written, verified allegations, and there are no specific provisions for filing an answer. Ind. Code § 29-1-7-17; *see also State ex rel. Brosman v. Whitley Circuit Ct.*, 245 Ind. 259, 198 N.E.2d 3 (1964).

Interested persons may contest a will. Ind. Code § 29-1-7-17. Parties claiming to be interested bear the burden of proving that they are heirs, devisees, spouses, creditors, or any others having a property right in or claim against the estate of a decedent being administered. This meaning may vary at different stages and different parts of a proceeding and must be determined according to the particular purpose and matter involved. Ind. Code § 29-1-1-3; *Cook*, 414 N.E.2d 581 (burden of proof).

The Indiana Court of Appeals has held in order to have standing to request attorney's fees in a will contest action, the party challenging the will must be a devisee in the next will in line to be probated. "In other words, had the challenged will been set aside, the challengers would directly, and immediately, benefit as a result." *Stibbins v. Foster*, 45 N.E.3d 419, 425 (Ind. Ct. App. 2015), *modified in part on reh'g and reh'g denied, transfer denied*.

For a discussion of the relevance of the "dead man's" statute to will contests, see R. Miller, *Indiana Evidence* 601.405 (1984); Ind. Code § 34-45-2-5.

3903 Will—Definition

A will is a written document that determines what will happen to a person's property after the person's death.

Comments

A will is an instrument executed with the formalities required by law whereby a person disposes of property to take effect after death. *Heaston v. Kreig*, 167 Ind. 101, 77 N.E. 805 (1906); *Van Orman v. Van Orman*, 112 Ind. App. 394, 41 N.E.2d 693 (1942).

This instruction should be modified for cases involving nuncupative (oral) wills. See Instruction No. 3917.

3905 Right of Disposition

A person of sound mind, acting under [his][her] own free will, has the right to make a will to leave [her][his] property to whom [he][she] chooses, no matter how unfair or unjust [his][her] decisions may appear to others.

Comments

In a will contest based on testamentary capacity or undue influence, the jury may be instructed to consider the provisions of the controverted will, together with the natural objects of the testator's bounty and other evidence, in determining the mental condition of the testator. *Workman v. Workman*, 113 Ind. App. 245, 46 N.E.2d 718, 731 (1943).

In *Able v. Bane*, 123 Ind. App. 585, 110 N.E.2d 306 (1953), the Indiana Appellate Court held it was prejudicial to give an instruction substantially equivalent to this model instruction without informing the jury that the wife had a statutory right to elect to take against the will. If such a case arises, the Committee recommends informing the jury of the right to take against the will and death benefits of surviving spouses and minor children.

3907 Testamentary Capacity—Definition

A person is of sound mind if [he][she] is able to:

- (1) know the extent and value of [his][her] property;
- (2) know the number and names of people who might naturally be expected to receive property under the will;
- (3) know what each person should receive, given the person's conduct toward the person making the will; and
- (4) keep these facts in mind long enough to complete a will.

Comments

This instruction should be read as a preliminary instruction and again as a final instruction.

A testator is presumed to be of sound mind to execute a will. *Hays v. Harmon*, 809 N.E.2d 460, 464 (Ind. Ct. App. 2004). To rebut this presumption, a party must show that the testator lacked the capacity at the time of executing the will to know: (1) the extent and value of his property; (2) those who are the natural objects of his bounty; and (3) what they deserve, with respect to their treatment of and conduct toward him. *Gast v. Hall*, 858 N.E.2d 154, 165 (Ind. Ct. App. 2006); *see also* Reed, *Breaking Wills in Indiana*, 14 Ind. L. Rev. 865 (1981).

Testamentary capacity is determined on the date that the will was executed; evidence of mental condition before execution is admissible, because it relates to the testator's mental state when executing his will. *Estate of Verdi ex rel. Verdi v. Toland*, 733 N.E.2d 25 (Ind. Ct. App. 2000).

It has been suggested that it is error to instruct on the presumption of sound mind. *Kaiser v. Happel*, 219 Ind. 28, 36 N.E.2d 784 (1941). More recent cases discuss the method of instructing on presumptions, however. *See, e.g., Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 985 (Ind. 2006).

Any person of sound mind who is eighteen years of age or older, or who is under eighteen years of age and a member of the armed forces, may make a will. Ind. Code § 29-1-5-1.

3909 Requirements of Due Execution—Will Other than Oral (Nuncupative) Will

There must be at least two witnesses to a will. To properly complete a will, a person must [signify to][tell] those witnesses that the document is [his][her] will, and in the witnesses' presence must either:

- (1) sign the will; or
- (2) acknowledge that [he][she] has already signed the will; or
- (3) at the person's direction and in the person's presence, have someone else sign the person's name on the will.

The witnesses must also sign the will in the presence of the person making the will and in the presence of each other.

Comments

This instruction should be read as a preliminary instruction and again as a final instruction in a case involving a will other than a nuncupative will.

The manner in which a will must be executed is set out in Ind. Code § 29-1-5-3.

The right to dispose of property by will was created by statute, and the statutory formalities for the execution of a will must be strictly construed and followed. *Granger's Estate v. Gosport Cemetery Ass'n*, 124 Ind. App. 686, 118 N.E.2d 386 (1954). A purported will not executed in accordance with the statutory requirements in effect at the time of execution or the testator's death is void. *Keener v. Archibald*, 533 N.E.2d 1268 (Ind. Ct. App. 1989).

Compliance with the statutory formalities for the execution of a will is a question of fact. *In re Estate of Belanger*, 433 N.E.2d 39 (Ind. Ct. App. 1982).

Ind. Code § 29-1-5-3.1 sets forth the requirements for a self-proving will. If a will is self-proved, the execution requirements are presumed, unless there is proof of fraud or forgery affecting the acknowledgment or verification. Ind. Code § 29-1-7-13(c). While the statute authorizes a self-proving provision, it does not require it. *Modlin v. Riggle*, 399 N.E.2d 767 (Ind. Ct. App. 1980); *see also* Ind. Code § 29-1-7-13(c) (“[i]f the will is self-proved, compliance with signature requirements for execution and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will . . .”). Thus, the self-proving portion of an Indiana will serves as evidence of due execution, and no more.

3911 Undue Influence—Definition

[Plaintiff(s)] claim[s] that the person who made the will in this case was unduly influenced by [insert name of alleged influencers] and therefore claim[s] that the will should be set aside.

Undue influence is influence that overpowers the mind of the person making the will, destroying the person's freedom to decide at the time the will is written.

It must be directly related to making the will and of such force that the will in reality represents the intentions of another person.

Comments

Undue influence is broadly defined as a perpetrator's unlawful imposition of power and will to force the victim to do an involuntary act. *Arnold v. Parry*, 173 Ind. App. 300, 363 N.E.2d 1055 (1977); *Hinshaw v. Hinshaw*, 134 Ind. App. 22, 182 N.E.2d 805 (1962). In a will contest, undue influence references the methods used to affect and overcome a testator's free and unrestrained will. *Lindinger v. Lindinger*, 126 Ind. App. 463, 130 N.E.2d 75 (1955).

To void a will, undue influence must be directly connected with and operate at the time of the will execution. *McCartney v. Rex*, 127 Ind. App. 702, 145 N.E.2d 400 (1957).

Undue influence is never presumed, and the real question is the testator's mental soundness, whether his mind was, in fact, unduly influenced. *Kronmiller v. Wangberg*, 665 N.E.2d 624 (Ind. Ct. App. 1996); see also Reed, *Breaking Wills in Indiana*, 14 Ind. L. Rev. 865 (1981) (for varieties of conduct found to constitute undue influence).

3913 Duress

A document signed under duress is invalid. Duress means any restraint, threat, intimidation, or bodily harm directed at a person that pressures the person to sign a document, when that person lacks the strength of mind or will to resist.

The party claiming duress must prove by the greater weight of the evidence that the person who signed the document did not have the power to resist under the circumstances.

Among other things, you may consider evidence such as the person's age, experience, health, mental state, and relationships with other people involved.

Comments

This instruction should be modified to correspond to evidence of characteristics other than age, experience, health and mental state.

Duress is an actual or threatened violence or restraint of a person contrary to law to compel execution of a contract. *Rutter v. Excel Industries, Inc.*, 438 N.E.2d 1030 (Ind. Ct. App. 1982).

"Economic duress" does not come within Indiana's definition of duress; where the alleged victim acted freely and voluntarily and the contract was induced, not by loss of volition but a desire to avoid inconvenience, delay or economic hardship, duress was not present. *Raymundo v. Hammond Clinic Ass'n*, 449 N.E.2d 276 (Ind. 1983).

3915 Validity of Will and Codicil

A “codicil” is an amendment or change to a valid will after the will was originally written, witnessed, and signed.

You may decide that the codicil and the will are valid or you may decide both are invalid. Or, you may decide the will is valid and the codicil is invalid.

Comments

This instruction should be given when an action to contest a will or to resist probate involves the issue of republication by codicil.

The term “will” includes all wills, testaments, and codicils; it also includes a testamentary instrument which merely appoints an executor or revokes or revives another will. Ind. Code § 29-1-1-3(a)(28). Thus a codicil must be executed with the same formalities as are required for a will in order to be valid. Ind. Code § 29-1-5-3; *see also Pfaffenberger v. Pfaffenberger*, 189 Ind. 507, 127 N.E. 766 (1920).

3917 Requirements of Due Execution—Nuncupative (Oral) Will

You must decide whether the oral will made by [decedent] shortly before [his][her] death is a valid will.

[Decedent]'s oral will is a valid will if:

- (1) [decedent] was in imminent peril of death;
- (2) [decedent] died as a result of that peril;
- (3) [decedent] stated, before two disinterested witnesses, that the gift of property [he][she] wished to make was [his][her] will at that time;
- (4) one of the witnesses wrote down, or directed someone else to write down, [decedent]'s statement within thirty days after [decedent] made it; and
- (5) the written statement was submitted to the Court within six months after [decedent] died.

Comments

Indiana Code § 29-1-5-4 fixes the requirements for an oral (nuncupative) will and provides that the will may only dispose of personal property of an aggregate value not exceeding \$1,000, except that military personnel in wartime may dispose of \$10,000 in value. A judge should not instruct on these limits unless they are an issue in the case.

If testamentary capacity or undue influence is at issue, it may be necessary to modify Instruction No. 3905 on a testator's right of disposition. See *Able v. Bane*, 123 Ind. App. 585, 110 N.E.2d 306 (1953).

3919 Responsible Cause (Proximate Cause)—Definition

A person's conduct is legally responsible for causing [an injury][property damage][a death] if:

- (1) the [injury][property damage][a death] would not have occurred without the conduct, and
- (2) the [injury][property damage][a death] was a natural, probable, and foreseeable result of the conduct.

This is called a "responsible cause."

[There can be more than one responsible cause for an injury.]

Comments

Proximate cause has been discussed in the context of whether fraudulent conduct caused a plaintiff's failure to file a will contest within the statutory period. *See, e.g., Estate of Wilson v. Wilson*, 610 N.E.2d 851, 855 (Ind. Ct. App. 1993); *In re Estate of Niemiec*, 435 N.E.2d 999, 1001 (Ind. Ct. App. 1982). A judge should entertain arguments about whether, and to what extent, proximate cause applies to other aspects of will contests.

Scholars identify the use of legal jargon and arcane legalese as the most serious flaws of contemporary jury instructions. John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 Am. Crim. L. Rev. 1187, 1209 (2002). In fact, in one study of 14 jury instructions, the proximate cause instruction produced proportionally the most misunderstanding among laypersons. The study revealed that jurors mistake "proximate cause" for "approximate cause," "estimated cause," or some fabrication. Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979); *see also* Robert L. Winslow, *The Instruction Ritual*, 13 Hastings L.J. 456, 468 (1962) ("proximate cause" is frequently misinterpreted to mean "probable" or "approximate cause"); James D. Wascher, *The Importance of Juries: The Long March Toward Plain English Jury Instructions*, 19 Chicago Bar Ass'n Record 50, 50-51 (2005) (a Chicago judge reported that he presided over a trial in which the jury sent him a note asking whether proximate cause meant "it's pretty close to the cause").

Prosser and Keeton say that proximate cause is "is an unfortunate word, which places entirely the wrong emphasis on the factor of physical or mechanical closeness." Prosser & Keeton, *The Law of Torts* § 42. They even imply that it was a sin to have coined the term "proximate cause" in the first place. Prosser & Keeton, *The Law of Torts* § 42. ("The word 'proximate' is a legacy of Lord Chancellor Bacon, who in his time committed other sins.") The Committee has determined that use of a term so likely to be misunderstood is against the policy behind clear jury instructions.

There are two types of causation in a negligence case—causation in fact and proximate cause. *See, e.g., Prosser & Keeton, The Law of Torts* §§ 41 (causation in fact), 42 (proximate cause) (5th ed. 1984). Causation in fact is the threshold question of whether "but for" the defendant's negligent conduct, plaintiff's harm

would not have occurred. Or, to put it another way, plaintiff's harm would not have occurred without the defendant's negligent conduct. *Indianapolis v. Parker*, 427 N.E.2d 456, 461 (Ind. Ct. App. 1981) (citing W. Prosser, Handbook of the Law of Torts § 41 (4th ed. 1971); 21 I.L.E. Negligence § 62 (1959)). Because the consequences of an act go forward to eternity and back before the dawn of human events, there must also be "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." Prosser & Keeton, The Law of Torts § 41. This is proximate cause, and it boils down to "whether the conduct has been so significant and important a cause that the defendant should be legally responsible." Prosser & Keeton, The Law of Torts § 41. Prosser and Keeton therefore suggest that either "responsible cause" or "legal cause" would be a more appropriate term. Prosser & Keeton, The Law of Torts §§ 41. Because use of the term "legal cause" might suggest to the jury that there could also be an "illegal cause," the Committee selected "responsible cause."

The Indiana Supreme Court has held that a proximate cause instruction is not *required* to refer to "but for" causation, "so long as the instructions as a whole adequately convey the law in this area." *Clay City Consol. Sch. Corp. v. Timberman*, 918 N.E.2d 292, 301 (Ind. 2009). To ensure that the instructions as a whole *do* adequately convey both proximate cause and causation in fact, the Committee has included both concepts in this one instruction. Subpart (1) of the instruction ("the injury would not have occurred without the conduct") instructs on causation in fact. And because the Indiana Supreme Court has explained proximate cause as the natural and probable consequence of the conduct, subpart (2) of the instruction ("the injury was a natural and probable result of the conduct") instructs on proximate cause. "A negligent act is said to be the proximate cause of an injury 'if the injury is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.'" *Paragon Family Rest. v. Bartolini*, 799 N.E.2d 1048, 1054 (Ind. 2003) (quoting *Bader v. Johnson* 732 N.E.2d 1212, 1218 (Ind. 2000)).

Plaintiff in a negligence action has the burden of proving causation in fact by a preponderance of the evidence. *Turner v. Davis*, 699 N.E.2d 1217 (Ind. Ct. App. 1998) (causation in fact); *Carter v. Aetna Life Ins. Co.*, 217 Ind. 282, 27 N.E.2d 75 (1940) (proximate cause). What is the proximate cause of the injury is ordinarily a question of fact for the jury that becomes a question of law when only a single conclusion can be drawn from the facts. *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101 (Ind. Ct. App. 1999).

The court is not required to repeat the substance of an instruction defining proximate cause, and outlining the necessity of establishing it, in every general instruction relating to the subject of negligence. *Swallow Coach Lines, Inc. v. Cosgrove*, 214 Ind. 532, 15 N.E.2d 92 (1938).

The "conduct" discussed in this Instruction includes acts and omissions. *See, e.g.*, Instruction Nos. 909 and 1107.

There can be more than one responsible cause for an injury. *See, e.g.*, *Hellums v. Raber*, 853 N.E.2d 143, 146 (Ind. Ct. App. 2006) ("An injury may have more than one proximate cause."); *Board of Comm'rs v. Price*, 587 N.E.2d 1326, 1333 (Ind. Ct. App. 1992) ("There may be more than one proximate cause of an event."); *Krohn v. Shidler*, 140 Ind. App. 175, 185 (1966) ("It is not necessary that such

negligence be the sole proximate cause.”). The bracketed sentence about multiple responsible causes should be given when it is an issue in the case.

3920 Foreseeable—Defined

[An injury][Property damage][A death] is “foreseeable” when a person should realize that [his][her] act or failure to act might cause harm.

Comments

In the context of proximate/responsible cause, the question is whether the injury “is a natural and probable consequence, which in the light of the circumstances, should have been foreseen or anticipated.” *Control Techniques, Inc. v. Johnson*, 762 N.E.2d 104, 108 (Ind. 2002) (citing *Bader v. Johnson*, 732 N.E.2d 1212, 1218 (Ind. 2000)). “The determination of what is reasonably foreseeable is not judged by the subjective opinions of those involved, but is based upon the standard of due care in avoiding a result which might reasonably have been anticipated in the ordinary experience of people.” *Arnold v. F.J. Hab, Inc.*, 745 N.E.2d 912, 917–18 (Ind. Ct. App. 2001) (citing *Ashcraft v. Northeast Sullivan County Sch. Corp.*, 706 N.E.2d 1101, 1105 (Ind. Ct. App. 1999)). When some harm is foreseeable, a person is responsible for any injury even if the extent of the injury was unforeseeable. *Bolin v. Wingert*, 764 N.E.2d 201, 207–08 (Ind. 2002). “If the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor’s negligence.” *Hampton v. Moistner*, 654 N.E.2d 1191, 1194 (Ind. Ct. App. 1995).

CHAPTER 5000

VERDICT FORMS

SYNOPSIS

5000 Admitted Fault

A. Comparative Fault

- 5001(A) Comparative Fault—One Plaintiff/One Defendant
- 5001(B) Comparative Fault—One Plaintiff/One Defendant
- 5001(C) Comparative Fault—One Plaintiff/One Defendant
- 5003(A) Comparative Fault—One Plaintiff/Two Defendants
- 5003(B) Comparative Fault—One Plaintiff/Two Defendants
- 5003(C) Comparative Fault—One Plaintiff/Two Defendants
- 5004 Comparative Fault—Apportionment—One Plaintiff/Two Defendants (One Common Law Defendant)—If All Parties Agree Judge Calculates Each Defendant's Liability
- 5005(A) Comparative Fault—Plaintiff and Spouse (Consortium Claim)
- 5005(B) Comparative Fault—Plaintiff and Spouse (Consortium Claim)
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- 5007(A) Comparative Fault—Two Plaintiffs Both Claimed at Fault
- 5007(B1) Comparative Fault—Two Plaintiffs Both Claimed at Fault
- 5007(B2) Comparative Fault—Two Plaintiffs Both Claimed at Fault
- 5007(C1) Comparative Fault—Two Plaintiffs Both Claimed at Fault
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- 5009(A) Comparative Fault—Two Plaintiffs with One Claimed at Fault
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- 5009(C1) Comparative Fault—Two Plaintiffs with One Claimed at Fault
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- 5011(A) Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One
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- 5011(C1) Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One
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5012 Comparative Fault—For Plaintiff with Punitive Damages**B. Common Law Negligence****5013 Common Law Negligence—For Plaintiff****5015 Common Law Negligence—For Plaintiff with Punitive Damages****5017 Common Law Negligence—For Defendant****5019 Common Law Negligence—For Plaintiff Against All Defendants****5020 Common Law Negligence—For Plaintiff Against All Defendants—Separate and Distinct Harms****5021 Common Law Negligence—For Plaintiff Against Some Defendants****5022 Common Law Negligence—For Plaintiff Against Some, But Not All, Defendants—Separate and Distinct Harms****5023 Common Law Negligence—For Defendants Against Plaintiff****5025 Common Law Negligence—Counterclaim—For Plaintiff****5027 Common Law Negligence—Counterclaim—For Counterclaimant****5029 Common Law Negligence—Counterclaim—Against Plaintiff and Counterclaimant****5031 Common Law Negligence—Complaint and Counterclaim****C. Condemnation & Will Contests****5033 Verdict in Eminent Domain Proceedings****5035 Will Invalid—Probated or Unprobated****5037 Will Valid—Probated or Unprobated****5039 Codicil Invalid—Probated or Unprobated****5041 Codicil Valid—Probated or Unprobated****D. Wrongful Death (Both Comparative Fault and Common Law Negligence)****5043(A) Wrongful Death—Surviving Dependent Children, Surviving Spouse, Surviving Dependent Next of Kin—Comparative Fault****5043(B) Wrongful Death—Surviving Dependent Children, Surviving Spouse, Surviving Dependent Next of Kin—Comparative Fault****5043(C) Wrongful Death—Surviving Dependent Children, Surviving Spouse, Surviving Dependent Next of Kin—Comparative Fault****5045 Damages for Wrongful Death—Surviving Dependent Children, Surviving Spouse, Surviving Dependent Next of Kin—Common Law Negligence****5046(A) Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Comparative Fault****5046(B) Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Comparative Fault****5046(C) Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Comparative Fault****5046(D) Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Common Law Negligence****5046(E) Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of**

Kin—Common Law Negligence

- 5047(A) Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Comparative Fault**
- 5047(B) Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Comparative Fault**
- 5047(C) Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Comparative Fault**
- 5049 Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Common Law Negligence**

E. Loss of Chance

- 5051(A) Loss of Chance**
- 5051(B) Loss of Chance—Ultimate Harm is Death**
- 5051(C) Loss of Chance—Ultimate Harm is Not Death**

5000 Admitted Fault

We decide that the total amount of damages [*Plaintiff*] is entitled to recover is:

\$_____.

Date

Presiding Juror

A. Comparative Fault

5001(A) Comparative Fault—One Plaintiff/One Defendant

[Caption]

VERDICT FOR DEFENDANT

We, the Jury, decide that the Defendant, [name], was not at fault, and therefore decide in favor of the Defendant, [name], and against the Plaintiff, [name].

Date Presiding Juror

Comments

Verdict Forms 5001(A)–(C) should be used along with Instruction No. 941. They have been drafted to complement one another.
See Torrence v. Gamble, 124 N.E.3d 1249 (Ind. Ct. App. 2019).

5001(B) Comparative Fault—One Plaintiff/One Defendant

[Caption]

VERDICT FOR DEFENDANT

We, the Jury, assign the following percentages of fault:

Plaintiff, [name]	_____ %
Defendant, [name]	_____ %
[Non-party, (name)]	_____ %
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because Plaintiff's fault is greater than 50%, we therefore decide in favor of the Defendant, [name], and against the Plaintiff, [name].

_____	_____
Date	Presiding Juror

5001(C) Comparative Fault—One Plaintiff/One Defendant

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, assign the following percentages of fault:

Plaintiff, [name] _____ %
Defendant, [name] _____ %
[Non-party, (name)] _____ %
TOTAL _____ 100%

(The fault percentages listed in the blanks must total 100%)

Because Plaintiff's fault is 50% or less, we therefore decide in favor of the Plaintiff, [name], and against the Defendant, [name].

We also decide that the total amount of damages the Plaintiff, [name], is entitled to recover, without considering the fault percentages, is \$_____. (Enter this amount below as Total Damages.)

We therefore calculate the Plaintiff's Verdict Amount as follows:

Total Damages _____
Defendant's percentage of fault x _____ %
Plaintiff's Verdict Amount = _____

Date

Presiding Juror

5003(A) Comparative Fault—One Plaintiff/Two Defendants

[Caption]

VERDICT FOR DEFENDANTS

We, the Jury, decide that the Defendants, [names], were not at fault, and therefore decide in favor of the Defendants, [names], and against the Plaintiff, [name].

Date

Presiding Juror

Comments

Verdict Forms 5003(A)–(C) should be used along with Instruction No. 943. They have been drafted to complement one another.

5003(B)

Comparative Fault—One Plaintiff/Two Defendants

[Caption]

VERDICT FOR DEFENDANTS

We, the Jury, assign the following percentages of fault:

Plaintiff, [name]	_____%
1st Defendant, [name]	_____%
2nd Defendant, [name]	_____%
[Non-party, (name)]	_____%
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because Plaintiff's fault is greater than 50%, we therefore decide in favor of the Defendants, [names], and against the Plaintiff, [name].

Date

Presiding Juror

5003(C) Comparative Fault—One Plaintiff/Two Defendants

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, assign the following percentages of fault:

Plaintiff, [name]	_____ %
1st Defendant, [name]	_____ %
2nd Defendant, [name]	_____ %
[Non-party, (name)]	_____ %]
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because Plaintiff's fault is 50% or less, we therefore decide in favor of the Plaintiff, [name], and against the Defendants, [names].

We also decide that the total amount of damages the Plaintiff, [name], is entitled to recover, without considering the fault percentages, is \$_____. (Enter this amount below as Total Damages.)

We therefore calculate the Plaintiff's Verdict Amount as follows:

1st Defendant [name]:

We calculate damages against the 1st Defendant [name] as follows:

Total Damages	_____
1st Defendant's percentage of fault	x _____ %
Plaintiff's Verdict Amount against 1st Defendant	= _____

2nd Defendant [name]:

We calculate damages against the 2nd Defendant [name] as follows:

Total Damages	_____
2nd Defendant's percentage of fault	x _____ %
Plaintiff's Verdict Amount against 2nd Defendant	= _____

_____ Date	_____ Presiding Juror
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**5004 Comparative Fault—Apportionment—One Plaintiff/Two Defendants
(One Common Law Defendant)—If All Parties Agree Judge Calculates
Each Defendant’s Liability**

[Caption]

VERDICT

We decide that the total amount of [plaintiff]’s damages, without considering the fault percentages, is \$[].

We, the Jury, assign the following percentages of fault:

Plaintiff, [name]	[]%
1st Defendant, [name]	[]%
2nd Defendant, [name]	[]%
[Non-party, (name)]	[]%
TOTAL	100%

(The fault percentages listed in the blanks must total 100%).

Date

Presiding Juror

Comment

Use with Instruction 944(A), 1142(A), or 1571(A).

The parties and the court acknowledge Ind. Code 34-51-2-11 requires that the jury enter the dollar amount of the verdict for comparative fault defendants. This instruction is to be used only when the parties all agree that the judge will calculate the dollar amount of the verdict[s].

5005(A) Comparative Fault—Plaintiff and Spouse (Consortium Claim)

[Caption]

VERDICT FOR DEFENDANT

We, the Jury, decide that the Defendant, [name], was not at fault, and therefore decide in favor of the Defendant, [name], and against the Plaintiffs, [both names].

Date

Presiding Juror**Comments**

Verdict Forms 5005(A)–(C) should be used along with Instruction No. 945. They have been drafted to complement one another.

Verdict Forms 5005(A)–(C) provide for a derivative claim made on behalf of a spouse, which is the most common derivative claim. The form should be suitable when modified for other derivative claims.

5005(B) Comparative Fault—Plaintiff and Spouse (Consortium Claim)

[Caption]

VERDICT FOR DEFENDANT

We, the Jury, assign the following percentages of fault:

Plaintiff, [primary plaintiff's name]	_____%
Defendant, [name]	_____%
[Non-party, (name)]	_____%
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because Plaintiff's fault is greater than 50%, we therefore decide in favor of the Defendant, [name], and against the Plaintiffs, [both names].

Date

Presiding Juror

5005(C) Comparative Fault—Plaintiff and Spouse (Consortium Claim)

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, assign the following percentages of fault:

Plaintiff, [name] _____%

Defendant, [name] _____%

[Non-party, (name) _____%]

TOTAL _____ 100%

(The fault percentages listed in the blanks must total 100%)

Because Plaintiff's fault is 50% or less, we therefore decide in favor of the Plaintiff, [primary plaintiff's name], and against the Defendant, [name].

We also decide that the total amount of damages the Plaintiff, [primary plaintiff's name], is entitled to recover, without considering the fault percentages, is \$_____. (Enter this amount below as Total Damages.)

We therefore calculate the Plaintiff's Verdict Amount as follows:

Total Damages _____

Defendant's percentage of fault _____ x _____%

Plaintiff's Verdict Amount _____ = _____

We further decide that the total amount of damages that the Plaintiff's Spouse, [plaintiff's spouse's name], is entitled to recover, without considering the fault percentages, is \$_____. (Enter this amount below as Spouse's Total Damages.)

We therefore calculate the Plaintiff's Spouse's Verdict Amount as follows:

Spouse's Total Damages _____

Defendant's percentage of fault _____ x _____%

Plaintiff's Spouse's Verdict Amount _____ = _____

Date _____ Presiding Juror

5007(A)

Comparative Fault—Two Plaintiffs Both Claimed at Fault

[Caption]

VERDICT FOR DEFENDANT

We, the Jury, decide that the Defendant, [name], was not at fault, and therefore decide in favor of the Defendant, [name], and against the Plaintiffs, [names].

Date

Presiding Juror

Comments

Verdict Forms 5007(A)–(C2) should be used along with Instruction No. 947. They have been drafted to complement one another.

5007(B1)

Comparative Fault—Two Plaintiffs Both Claimed at Fault

[Caption]

VERDICT FOR DEFENDANT

AS TO CLAIM OF PLAINTIFF [NAME OF 1ST PLAINTIFF]

We, the Jury, assign the following percentages of fault:

1st Plaintiff, [name]	_____ %
2nd Plaintiff, [name]	_____ %
Defendant, [name]	_____ %
[Non-party, (name)]	_____ %]
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because the fault of Plaintiff [1st Plaintiff's name] is greater than 50%, we therefore decide in favor of the Defendant, [name], and against the Plaintiff, [1st Plaintiff's name].

Date

Presiding Juror

5007(B2)

Comparative Fault—Two Plaintiffs Both Claimed at Fault

[Caption]

VERDICT FOR DEFENDANT

AS TO CLAIM OF PLAINTIFF [NAME OF 2nd PLAINTIFF]

We, the Jury, assign the following percentages of fault:

1st Plaintiff, [name]	_____%
2nd Plaintiff, [name]	_____%
Defendant, [name]	_____%
[Non-party, (name)]	_____%
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because the fault of Plaintiff [2nd Plaintiff's name] is greater than 50%, we therefore decide in favor of the Defendant, [name], and against the Plaintiff, [2nd Plaintiff's name].

Date

Presiding Juror

5007(C1)

Comparative Fault—Two Plaintiffs Both Claimed at Fault

[Caption]

VERDICT FOR PLAINTIFF [NAME OF 1ST PLAINTIFF]

We, the Jury, assign the following percentages of fault:

1st Plaintiff, [name]	_____%
2nd Plaintiff, [name]	_____%
Defendant, [name]	_____%
[Non-party, (name)]	_____%
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because the fault of Plaintiff [1st Plaintiff's name] is 50% or less, we therefore decide in favor of the Plaintiff, [1st Plaintiff's name], and against the Defendant, [name].

We also decide that the total amount of damages the Plaintiff, [1st Plaintiff's name], is entitled to recover, without considering the fault percentages, is \$_____. (Enter this amount below as Total Damages.)

We therefore calculate the Verdict Amount in favor of Plaintiff, [1st Plaintiff's name] as follows:

Total Damages	_____
Defendant's percentage of fault	x _____%
Verdict Amount in favor of Plaintiff, [1st Plaintiff's name]	= _____

Date

Presiding Juror

5007(C2) Comparative Fault—Two Plaintiffs Both Claimed at Fault

[Caption]

VERDICT FOR PLAINTIFF [NAME OF 2nd PLAINTIFF]

We, the Jury, assign the following percentages of fault:

1st Plaintiff, [name]	_____ %
2nd Plaintiff, [name]	_____ %
Defendant, [name]	_____ %]
[Non-party, (name)	_____ %]
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because the fault of Plaintiff [2nd Plaintiff's name] is 50% or less, we therefore decide in favor of the Plaintiff, [2nd Plaintiff's name], and against the Defendant, [name].

We also decide that the total amount of damages the Plaintiff, [2nd Plaintiff's name], is entitled to recover, without considering the fault percentages, is \$_____. (Enter this amount below as Total Damages.)

We therefore calculate the Verdict Amount in favor of Plaintiff, [2nd Plaintiff's name] as follows:

Total Damages	_____
Defendant's percentage of fault	x _____ %
Verdict Amount in favor of Plaintiff, [2nd Plaintiff's name]	= _____

Date Presiding Juror

5009(A) Comparative Fault—Two Plaintiffs with One Claimed at Fault
[Caption]

VERDICT FOR DEFENDANT

We, the Jury, decide that the Defendant, [name], was not at fault, and therefore decide in favor of the Defendant, [name], and against the Plaintiffs, [names].

Date _____ Presiding Juror _____

Comments

Verdict Forms 5003(A)–(C) should be used along with Instruction No. 943. They have been drafted to complement one another.

In cases where there are more than two plaintiffs additional forms of verdicts should be prepared following the pattern of Verdict Form 5007, if the additional plaintiffs are claimed to be at fault, or Verdict Form 5009, if the additional plaintiffs are not claimed to be at fault.

5009(B) Comparative Fault—Two Plaintiffs with One Claimed at Fault
[Caption]

VERDICT FOR DEFENDANT

AS TO CLAIM OF PLAINTIFF [NAME OF PLAINTIFF CLAIMED AT FAULT]

We, the Jury, assign the following percentages of fault:

Plaintiff, [name of plaintiff claimed at fault]	_____%
Defendant, [name]	_____%
[Non-party, (name)]	_____%
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because the fault of Plaintiff [name of plaintiff claimed at fault] is greater than 50%, we therefore decide in favor of the Defendant, [name], and against the Plaintiff, [name of plaintiff claimed at fault].

_____	_____
Date	Presiding Juror

Comments

Verdict Form 5009(C2) should always be submitted to the jury along with this form.

5009(C1) Comparative Fault—Two Plaintiffs with One Claimed at Fault

[Caption]

VERDICT FOR PLAINTIFF [NAME OF PLAINTIFF CLAIMED AT FAULT]

We, the Jury, assign the following percentages of fault:

Plaintiff, [name of plaintiff claimed at fault] _____%

Defendant, [name] _____%

[Non-party, (name)] _____%

TOTAL _____100%

(The fault percentages listed in the blanks must total 100%)

Because the fault of Plaintiff [name of plaintiff claimed at fault] is 50% or less, we therefore decide in favor of the Plaintiff, [name of plaintiff claimed at fault], and against the Defendant, [name].

We also decide that the total amount of damages the Plaintiff, [name of plaintiff claimed at fault], is entitled to recover, without considering the fault percentages, is \$_____. (Enter this amount below as Total Damages.)

We therefore calculate the Verdict Amount in favor of Plaintiff, [name of plaintiff claimed at fault] as follows:

Total Damages _____

Defendant's percentage of fault _____ x _____%

Verdict Amount in favor of Plaintiff, _____

[name of plaintiff claimed at fault] _____= _____

Date _____

Presiding Juror _____

Comments

Verdict Form 5009(C2) should always be submitted to the jury along with this form.

5009(C2)

Comparative Fault—Two Plaintiffs with One Claimed at Fault

[Caption]

VERDICT FOR PLAINTIFF

[NAME OF NO-FAULT PLAINTIFF]

We, the Jury, decide that the total amount of damages the Plaintiff, [name of no-fault plaintiff], is entitled to recover, without considering the fault percentages, is \$_____.
(Enter this amount below as Total Damages.)

We therefore calculate the Verdict Amount in favor of Plaintiff, [name of no-fault plaintiff] as follows:

Total Damages

Defendant's percentage of fault

Verdict Amount in favor of Plaintiff,
[name of no-fault plaintiff]

x

%

=

Date

Presiding Juror

5011(A) Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One

[Caption]

VERDICT FOR DEFENDANTS

We, the Jury, decide that the Defendants, [names], were not at fault, and therefore decide in favor of the Defendants, [names], and against the Plaintiffs, [names].

Date

Presiding Juror

Comments

Verdict Forms 5011(A)–(C2) should be used along with Instruction No. 951. They have been drafted to complement one another.

In cases where there are more than two plaintiffs additional forms of verdicts should be prepared following the pattern of Verdict Form 5007, if the additional plaintiffs are claimed to be at fault, or Verdict Form 5009, if the additional plaintiffs are not claimed to be at fault.

5011(B) Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One

[Caption]

VERDICT FOR DEFENDANT

AS TO CLAIM OF PLAINTIFF [NAME OF PLAINTIFF CLAIMED AT FAULT]

We, the Jury, assign the following percentages of fault:

Plaintiff, [name of plaintiff claimed at fault]	_____ %
Defendants, [names]	_____ %
[Non-party, (name)]	_____ %]
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because the fault of Plaintiff [name of plaintiff claimed at fault] is greater than 50%, we therefore decide in favor of the Defendants, [names], and against the Plaintiff, [name of plaintiff claimed at fault].

_____	_____
Date	Presiding Juror

Comments

Verdict Form 5011(C2) should always be submitted to the jury along with this form.

5011(C1)

Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One

[Caption]

VERDICT FOR PLAINTIFF [NAME OF PLAINTIFF CLAIMED AT FAULT]

We, the Jury, assign the following percentages of fault:

Plaintiff, [name of plaintiff claimed at fault]	_____ %
Defendants, [names]	_____ %
[Non-party, (name)]	_____ %]
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because the fault of Plaintiff [name of plaintiff claimed at fault] is 50% or less, we therefore decide in favor of the Plaintiff, [name of plaintiff claimed at fault], and against the Defendants, [names].

We also decide that the total amount of damages the Plaintiff, [name of plaintiff claimed at fault], is entitled to recover, without considering the fault percentages, is \$_____. (Enter this amount below as Total Damages.)

We therefore calculate the Verdict Amount in favor of Plaintiff, [name of plaintiff claimed at fault] as follows:

Total Damages	_____
Defendant's percentage of fault	x _____ %
Verdict Amount in favor of Plaintiff, [name of plaintiff claimed at fault]	= _____

Date

Presiding Juror

Comments

Verdict Form 5011(C2) should always be submitted to the jury along with this form.

5011(C2) Comparative Fault—Two Plaintiffs with One Claimed at Fault/Two Defendants Treated as One

[Caption]

VERDICT FOR PLAINTIFF [NAME OF NO-FAULT PLAINTIFF]

We, the Jury, decide that the total amount of damages the Plaintiff, [name of no-fault plaintiff], is entitled to recover, without considering the fault percentages, is \$_____. (Enter this amount below as Total Damages.)

We therefore calculate the Verdict Amount in favor of Plaintiff, [name of no-fault plaintiff] as follows:

Total Damages_____

Defendants' percentage of fault_____x _____%

Verdict Amount in favor of Plaintiff, [name of no-fault plaintiff]_____

Date_____

Presiding Juror_____

5012 Comparative Fault—For Plaintiff with Punitive Damages

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, further decide that the Plaintiff, [name] is entitled to receive \$_____ in punitive damages. (Please write 'zero' in the space provided if you decide that the Plaintiff is not entitled to receive punitive damages.)

Date_____
Presiding Juror**Comments**

This verdict form should be used in conjunction with the other comparative fault verdict forms when punitive damages are an issue in the case and when punitive damages are allowable. There is no absolute right to punitive damages, although in a proper case they may be awarded in addition to actual damages as punishment for the offense and to deter similar misconduct. *Glissman v. Rutt*, 175 Ind. App. 493, 372 N.E.2d 1188 (1978). Punitive damages are ordinarily prohibited without compensatory damages, but they may be awarded without compensatory damages if the plaintiff has proved defamation per se. *See Henrichs v. Pivarnik*, 588 N.E.2d 537 (Ind. Ct. App. 1992).

Although the Indiana Supreme Court has stated that punitive damages may be awarded on a showing of wanton and willful misconduct, *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019 (Ind. 1986), its later cases merely say that punitive damages are recoverable for acts done with malice, fraud, gross negligence, or oppressiveness. *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135 (Ind. 1988); *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993). The Indiana Court of Appeals has stated, however, that willful and wanton misconduct remains an independent circumstance in which punitive damages may be awarded. *America's Directories Incorporated, Inc. v. Stelhorn One Hour Photo, Inc.*, 833 N.E.2d 1059 (Ind. Ct. App. 2005).

To recover punitive damages in a breach of contract action, the plaintiff must plead and prove the existence of an independent tort for which Indiana would permit the recovery of punitive damages. *Miller Brewing Co. v. Best Beers*, 608 N.E.2d 975, 984 (Ind. 1993). An example of such an independent tort upon which punitive damages may be based is the breach of an insurer's duty to deal with its insured in good faith. *Erie Ins. Co.*, 622 N.E.2d at 520.

While some cases have stated that punitive damages are not recoverable if the defendant is also held criminally responsible for the same conduct, *see, e.g., Glissman v. Rutt*, 175 Ind. App. 493, 372 N.E.2d 1188 (1978), Indiana statute states, "[i]t is not a defense to an action for punitive damages that the defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action." Ind. Code § 34-24-3-3; *see also Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003). It must be noted that Ind. Code ch. 34-24-3 is a statutory remedy with elements and burden of proof that differ from common law punitive damages.

A court must reduce a jury's award of punitive damages to three times the compensatory damages or \$50,000, whichever is greater. Ind. Code §§ 34-51-3-4, -5; *Westray v. Wright*, 834 N.E.2d 173 (Ind. Ct. App. 2005). Except for punitive damages awards that must be deposited in the hazardous substances response trust fund, punitive damages must be paid to the clerk of the court, who pays 25 percent to the person who was awarded them and 75 percent into the violent crime victims compensation fund. Ind. Code § 34-51-3-6. This allocation is not an unconstitutional taking of property or use of the attorney's services without just compensation. *Cheatham*, 789 N.E.2d 467.

A jury cannot be advised of the limitation on the amount of punitive damages or the allocation to the victim's compensation fund. Ind. Code § 34-51-3-3.

B. Common Law Negligence**5013 Common Law Negligence—For Plaintiff**

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, decide in favor of the Plaintiff, [name], and against the Defendant, [name], and decide Plaintiff's damages are \$_____.

Date

Presiding Juror

5015

Common Law Negligence—For Plaintiff with Punitive Damages

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, decide in favor of the Plaintiff, [name], and against the Defendant, [name], and decide that Plaintiff’s damages (excluding punitive damages, if any) are \$_____

We, the Jury, further decide that the Plaintiff, [name] is entitled to receive \$_____ in punitive damages. (Please write ‘zero’ in the space provided if you decide that the Plaintiff is not entitled to receive punitive damages.)

Date

Presiding Juror

Comments

This verdict form should be given only where punitive damages are allowable. There is no absolute right to punitive damages, although in a proper case they may be awarded in addition to actual damages as punishment for the offense and to deter similar misconduct. *Glissman v. Rutt*, 175 Ind. App. 493, 372 N.E.2d 1188 (1978). Punitive damages are ordinarily prohibited without compensatory damages, but they may be awarded without compensatory damages if the plaintiff has proved defamation per se. *See Henrichs v. Pivarnik*, 588 N.E.2d 537 (Ind. Ct. App. 1992).

Although the Indiana Supreme Court has stated that punitive damages may be awarded on a showing of wanton and willful misconduct, *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019 (Ind. 1986), its later cases merely say that punitive damages are recoverable for acts done with malice, fraud, gross negligence, or oppressiveness. *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135 (Ind. 1988); *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993). The Indiana Court of Appeals has stated, however, that willful and wanton misconduct remains an independent circumstance in which punitive damages may be awarded. *America’s Directories Incorporated, Inc. v. Stellhorn One Hour Photo, Inc.*, 833 N.E.2d 1059 (Ind. Ct. App. 2005).

To recover punitive damages in a breach of contract action, the plaintiff must plead and prove the existence of an independent tort for which Indiana would permit the recovery of punitive damages. *Miller Brewing Co. v. Best Beers*, 608 N.E.2d 975, 984 (Ind. 1993). An example of such an independent tort upon which punitive damages may be based is the breach of an insurer’s duty to deal with its insured in good faith. *Erie Ins. Co.*, 622 N.E.2d at 520.

While some cases have stated that punitive damages are not recoverable if the defendant is also held criminally responsible for the same conduct, *see, e.g., Glissman v. Rutt*, 175 Ind. App. 493, 372 N.E.2d 1188 (1978), Indiana statute states, “[i]t is not a defense to an action for punitive damages that the defendant is subject to criminal prosecution for the act or omission that gave rise to the civil action.” Ind. Code § 34-24-3-3; *see also Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003). It must be noted that Ind. Code ch. 34-24-3 is a statutory remedy with elements and burden

of proof that differ from common law punitive damages.

A court must reduce a jury's award of punitive damages to three times the compensatory damages or \$50,000, whichever is greater. Ind. Code §§ 34-51-3-4, -5; *Westray v. Wright*, 834 N.E.2d 173 (Ind. Ct. App. 2005). Except for punitive damages awards that must be deposited in the hazardous substances response trust fund, punitive damages must be paid to the clerk of the court, who pays 25 percent to the person who was awarded them and 75 percent into the violent crime victims compensation fund. Ind. Code § 34-51-3-6. This allocation is not an unconstitutional taking of property or use of the attorney's services without just compensation. *Cheatham*, 789 N.E.2d 467.

A jury cannot be advised of the limitation on the amount of punitive damages or the allocation to the victim's compensation fund. Ind. Code § 34-51-3-3.

5017

Common Law Negligence—For Defendant

[Caption]

VERDICT FOR DEFENDANT

We, the Jury, decide in favor of the Defendant, [name], and against the Plaintiff, [name].

Date

Presiding Juror

Comments

See *Torrence v. Gamble*, 124 N.E.3d 1249 (Ind. Ct. App. 2019).

5019

Common Law Negligence—For Plaintiff Against All Defendants

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, decide in favor of the Plaintiff [name] and against all Defendants, [names], and decide that Plaintiff's damages are \$_____.

Date

Presiding Juror

5020 Common Law Negligence—For Plaintiff Against All Defendants—Separate and Distinct Harms

We, the Jury, decide in favor of the Plaintiff [*name*] and against the Defendants, [*names*].

We, the Jury, decide that [*Plaintiff*]'s damages against Defendant [*name*] are \$_____ ; that [*Plaintiff*]'s damages against Defendant [*name*] are \$_____.

5021 Common Law Negligence—For Plaintiff Against Some Defendants

[Caption]

VERDICT

We, the Jury, decide in favor of the Plaintiff, [name], and against the following Defendants: _____, and decide that Plaintiff’s damages are \$_____.

We, the Jury, decide in favor of the following Defendant(s): _____, and against the Plaintiff.

Date

Presiding Juror

5022 Common Law Negligence—For Plaintiff Against Some, But Not All, Defendants—Separate and Distinct Harms

We, the Jury, decide in favor of the Plaintiff [name] and against the following Defendants, [names].

We, the Jury, decide that [Plaintiff]’s damages against Defendant [name] are \$_____ ; that [Plaintiff]’s damages against Defendant [name] are \$_____.

We, the Jury, decide in favor of Defendant [name], and against the Plaintiff [name].

5023 Common Law Negligence—For Defendants Against Plaintiff

[Caption]

VERDICT FOR DEFENDANTS

We, the Jury, decide in favor of the Defendants, [names], and against the Plaintiff [name].

Date Presiding Juror

5025

Common Law Negligence—Counterclaim—For Plaintiff

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, decide in favor of the Plaintiff, [name], and against the Defendant, [name], on the Plaintiff's claim, and decide that Plaintiff's damages are \$_____.

We further decide in favor of the Plaintiff, [name], and against the Defendant, [name], on the Defendant's counterclaim.

Date

Presiding Juror

Comments

Verdict Forms 5025, 5027, and 5029 should be submitted to the jury together.

These forms may be used where a single plaintiff asserts a claim and a single defendant asserts a counterclaim arising from the same occurrence, such as damage to an automobile caused by a collision with the plaintiff.

These forms would not be appropriate in a case involving a counterclaim setoff arising from a different occurrence, because in setoff, findings in favor of both the plaintiff on his complaint and the defendant on his counterclaim are possible.

5027 Common Law Negligence—Counterclaim—For Counterclaimant*[Caption]***VERDICT FOR DEFENDANT**

We, the Jury, decide in favor of the Defendant, *[name]*, and against the Plaintiff, *[name]*, on the Plaintiff's claim.

We, the Jury, further decide in favor of the Defendant, *[name]*, and against the Plaintiff, *[name]*, on the Defendant's counterclaim, and decide that Defendant's damages are \$_____.

Date_____
Presiding Juror**Comments**

See Ind. Trial Rule 13.

Verdict Forms 5025, 5027, and 5029 should be submitted to the jury together.

These forms may be used where a single plaintiff asserts a claim and a single defendant asserts a counterclaim arising from the same occurrence, such as damage to an automobile caused by a collision with the plaintiff.

These forms would not be appropriate in a case involving a counterclaim setoff arising from a different occurrence, because in setoff, findings in favor of both the plaintiff on his complaint and the defendant on his counterclaim are possible.

5029 Common Law Negligence—Counterclaim—Against Plaintiff and Counterclaimant

[Caption]

VERDICT

We, the Jury, decide in favor of the Defendant, [name], and against the Plaintiff, [name], on the Plaintiff's claim.

We further decide in favor of the Plaintiff, [name], and against the Defendant, [name], on the Defendant's counterclaim.

Date Presiding Juror

Comments

See Ind. Trial Rule 13.

Verdict Forms 5025, 5027, and 5029 should be submitted to the jury together.

These forms may be used where a single plaintiff asserts a claim and a single defendant asserts a counterclaim arising from the same occurrence, such as damage to an automobile caused by a collision with the plaintiff.

These forms would not be appropriate in a case involving a counterclaim setoff arising from a different occurrence, because in setoff, findings in favor of both the plaintiff on his complaint and the defendant on his counterclaim are possible.

5031 Common Law Negligence—Complaint and Counterclaim*[Caption]***VERDICT**

(1) (Check one):

- ☐ We, the Jury, decide in favor of the Plaintiff, [name], and against the Defendant, [name], on the Plaintiff's claim, and decide that the Plaintiff's damages are \$_____.

OR

- ☐ We, the Jury, decide against the Plaintiff, [name], on the Plaintiff's claim, and decide that the Plaintiff should recover no damages.

(2) (Check one):

- ☐ We, the Jury, decide in favor of the Defendant, [name], and against the Plaintiff, [name], on the Defendant's counterclaim, and decide that the Defendant's damages are \$_____.

OR

- ☐ We, the Jury, decide against the Defendant, [name], on the Defendant's counterclaim, and decide that Defendant should recover no damages.

(3) (Check one):

- ☐ We therefore award \$_____ (subtract the smaller amount from the larger amount) to the _____ (choose Plaintiff or Defendant).

OR

- ☐ We have decided against both Plaintiff and Defendant on their claims, and therefore award no damages to either party.

Date_____
Presiding Juror**Comments**

This Verdict Form may be used where a single plaintiff asserts a claim and a single defendant asserts a counterclaim arising from a different occurrence.

C. Condemnation & Will Contests

5033 Verdict in Eminent Domain Proceedings

[Caption]

VERDICT

We, the Jury, decide that the Defendant [landowner][property owner]’s damages are \$_____.

Date

Presiding Juror

Comments

Landowners are entitled to prejudgment interest from the date of taking in an eminent domain proceeding. *Dicanio v. State Bank of Washington*, 493 N.E.2d 820 (Ind. Ct. App. 1986). In assessing the amount of interest due the landowner, however, the statute provides that:

In any trial of exceptions, the court or jury shall compute and allow interest at an annual rate of eight percent (8%) on the amount of a defendant’s damages from the date plaintiff takes possession of the property. Interest may not be allowed on any money paid by the plaintiff to the circuit court clerk:

- (A) after the money is withdrawn by the defendant; or
- (B) that is equal to the amount of damages previously offered by the plaintiff to any defendant and which amount can be withdrawn by the defendant without filing a written undertaking or surety with the court for the withdrawal of that amount.

Ind. Code § 32-24-1-11(d)(6); *see also State v. Denny*, 409 N.E.2d 652 (Ind. Ct. App. 1980).

5035 Will Invalid—Probated or Unprobated

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, decide that the document dated [date] and claimed to be the last will of [decedent], is invalid, and is not the last will of [decedent].

We therefore decide in favor of the Plaintiff, [name] and against the Defendant, [name].

Date

Presiding Juror

Comments

This instruction may be used in an action to resist probate of a will. It may also be used in a will contest where the will was already admitted to probate.

Judgment must be entered in accordance with jury’s finding in the verdict. *See* Ind. Code § 29-1-7-21 (using the word “shall”).

5037 Will Valid—Probated or Unprobated
[Caption]

VERDICT

We, the Jury, decide that the document dated [date] and claimed to be the last will of [decedent], is valid, and is the last will of [decedent].

We therefore decide in favor of the Defendant, [name] and against the Plaintiff, [name].

Date

Presiding Juror

5039

Codicil Invalid—Probated or Unprobated

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, decide that the document dated [date], is invalid, and is not a codicil to the last will of [decedent].

We therefore decide in favor of the Plaintiff, [name], and against the Defendant, [name].

Date

Presiding Juror

Comments

A valid codicil serves to republish the original will except as modified by codicil. *Oilar v. Oilar*, 188 Ind. 125, 120 N.E. 705 (1918); *Barnes v. Phillips*, 184 Ind. 415, 111 N.E. 419 (1916).

A duly executed codicil that disposes of no property but merely appoints an executor republishes the will. *Manship v. Stewart*, 181 Ind. 299, 104 N.E. 505 (1914).

5041 Codicil Valid—Probated or Unprobated

[Caption]

VERDICT FOR DEFENDANT

We, the Jury, decide that the document dated [date], is valid, and is a codicil to the last will of [decedent].

We therefore decide in favor of the Defendant, [name], and against the Plaintiff, [name].

Date

Presiding Juror

D. Wrongful Death (Both Comparative Fault and Common Law Negligence)

5043(A) Wrongful Death—Surviving Dependent Children, Surviving Spouse,
Surviving Dependent Next of Kin—Comparative Fault

[Caption] *1. In Jury Instruction 5043(A), the words "Comparative Fault" should be replaced with "Contributory Negligence."*

VERDICT FOR DEFENDANT

We, the Jury, decide that the Defendant, [name], was not at fault, and therefore decide in favor of the Defendant, [name], and against the Plaintiff, [name].

Date

Presiding Juror

**5043(B) Wrongful Death—Surviving Dependent Children, Surviving Spouse,
Surviving Dependent Next of Kin—Comparative Fault**

[Caption]

VERDICT FOR DEFENDANT

We, the Jury, assign the following percentages of fault:

Decedent, [name]	_____%
Defendant, [name]	_____%
[Non-party, (name)]	_____%
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because Decedent’s fault is greater than 50%, we therefore decide in favor of the Defendant, [name], and against the Plaintiff, [name].

Date

Presiding Juror

5043(C) Wrongful Death—Surviving Dependent Children, Surviving Spouse,
Surviving Dependent Next of Kin—Comparative Fault

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, assign the following percentages of fault:

Decedent, [name]	_____%
Defendant, [name]	_____%
[Non-party, (name)]	_____%]
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because Decedent’s fault is 50% or less, we therefore decide in favor of the Plaintiff, [name], and against the Defendant, [name].

We also decide that the total amount of damages the Plaintiff, [name], is entitled to recover, without considering the fault percentages, is \$_____. (Enter this amount below as Total Damages.)

We, the Jury, now decide in favor of the Plaintiff and assess damages against the Defendant, [name] as follows:

Total Damages	_____
Defendant’s percentage of fault	x _____%
Plaintiff’s Verdict Amount	= _____

We further specify that the amount of damages to be awarded to [name of personal representative], in [his][her][its] capacity as personal representative of [decedent]’s estate, and [names of surviving dependent children, surviving spouse, and surviving dependent next of kin] are as follows:

[name of personal representative]	\$_____	(only for reasonable medical, hospital, funeral, and burial expenses, and the cost of administering decedent’s estate)
[names of surviving dependent children, surviving spouse, and surviving dependent next of kin]	\$_____	
TOTAL	\$_____	

(The TOTAL above must equal the Plaintiff’s Verdict Amount.)

_____	_____
Date	Presiding Juror

5045 Damages for Wrongful Death—Surviving Dependent Children, Surviving Spouse, Surviving Dependent Next of Kin—Common Law Negligence

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, decide in favor of the Plaintiff [name], and against the Defendant, [name].
We further specify that the amount of damages to be awarded to [name of personal representative], in [his][her][its] capacity as personal representative of [decedent]’s estate, and [names of surviving dependent children, surviving spouse, and surviving dependent next of kin] are as follows:

[name of personal representative]	\$_____	(only for reasonable medical, hospital, funeral, and burial expenses, and the cost of administering decedent’s estate)
-----------------------------------	---------	--

[names of surviving dependent children, surviving spouse, and surviving dependent next of kin]	\$_____
--	---------

TOTAL	\$_____
-------	---------

Date _____	Presiding Juror _____
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**5046(A) Wrongful Death—No Surviving Spouse, Dependent Children or
Dependent Next of Kin—Comparative Fault**

[Caption]

VERDICT FOR DEFENDANT

We, the Jury, decide that the Defendant, [name], was not at fault, and therefore decide in favor of the Defendant, [name], and against the Plaintiff, [name of personal representative], in [his][her][its] capacity as personal representative of [decedent]'s estate.

Date _____ Presiding Juror

Comments

Verdict Forms 5046(A)–(E) should be used along with Instruction No. 731. They have been drafted to complement one another.

5046(B) Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Comparative Fault

[Caption]

VERDICT FOR DEFENDANT

We, the Jury, assign the following percentages of fault:

Decedent, [name]	_____ %
Defendant, [name]	_____ %
[Non-party, (name)]	_____ %]
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because Decedent’s fault is greater than 50%, we therefore decide in favor of the Defendant, [name], and against the Plaintiff, [name of personal representative], in [his][her][its] capacity as personal representative of [decedent]’s estate.

Date _____ Presiding Juror _____

Comments

Verdict Forms 5046(A)–(E) should be used along with Instruction No. 731. They have been drafted to complement one another.

5046(C) Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Comparative Fault

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, assign the following percentages of fault:

Decedent, [name]	_____ %
Defendant, [name]	_____ %
[Non-party, (name)]	_____ %]
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)

Because Decedent’s fault is 50% or less, we therefore decide in favor of the Plaintiff, [name of personal representative], in [his][her][its] capacity as personal representative of [decedent]’s estate, and against the Defendant, [name].

We also decide that the total amount of damages the Plaintiff, [name of personal representative], is entitled to recover, without considering the fault percentages, is \$_____. (Enter this amount below as Total Damages.)

We, the Jury, now decide in favor of the Plaintiff and assess damages against the Defendant, [name] as follows:

Total Damages	_____
Defendant’s percentage of fault	x _____ %
Plaintiff’s Verdict Amount	= _____

Date

Presiding Juror

Comments

Verdict Forms 5046(A)–(E) should be used along with Instruction No. 731. They have been drafted to complement one another.

5046(D) Wrongful Death—No Surviving Spouse, Dependent Children or Dependent Next of Kin—Common Law Negligence

[Caption]

VERDICT FOR DEFENDANT

We, the Jury, decide in favor of the Defendant, [name], and against the Plaintiff, [name of personal representative], in [his][her][its] capacity as personal representative of [decedent]’s estate.

Date

Presiding Juror

Comments

Verdict Forms 5046(A)–(E) should be used along with Instruction No. 731. They have been drafted to complement one another. This verdict form for the defendant should be submitted to the jury in all cases where it is possible for the jury to make a general finding for the defendant under the issues presented.

5046(E) Wrongful Death—No Surviving Spouse, Dependent Children or
Dependent Next of Kin—Common Law Negligence

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, decide in favor of the Plaintiff, [name of personal representative], in
[his][her][its] capacity as personal representative of [decedent]’s estate, and against the
Defendant, [name], and decide Plaintiff’s damages are \$_____.

Date

Presiding Juror

Comments

Verdict Forms 5046(A)–(E) should be used along with Instruction No. 731. They
have been drafted to complement one another.

VERDICT FORMS 5046(A)–(E) SHOULD BE USED ALONG WITH INSTRUCTION NO. 731.

5047(A) Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Comparative Fault

[Caption]

VERDICT FOR DEFENDANT

We, the Jury, decide that the Defendant, [name], was not at fault, and therefore decide in favor of the Defendant, [name], and against the Plaintiff, [name].

Date

Presiding Juror

5047(B) Wrongful Death—Unmarried Adult Person with Nondependent
Parents or Children—Comparative Fault

[Caption]

VERDICT FOR DEFENDANT

We, the Jury, assign the following percentages of fault:

Decedent, [name]	_____%
Defendant, [name]	_____%
[Non-party, (name)]	_____%
TOTAL	100%

(The fault percentages listed in the blanks must total 100%)
Because Decedent’s fault is greater than 50%, we therefore decide in favor of the
Defendant, [name], and against the Plaintiff, [name].

Date

Presiding Juror

5047(C) Wrongful Death—Unmarried Adult Person with Nondependent
Parents or Children—Comparative Fault

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, assign the following percentages of fault:

Decedent, [name] _____ %
Defendant, [name] _____ %
[Non-party, (name) _____ %]
TOTAL _____ 100%

(The fault percentages listed in the blanks must total 100%)

Because Decedent’s fault is 50% or less, we therefore decide in favor of the Plaintiff, [name], and against the Defendant, [name].

We also decide that the total amount of damages the Plaintiff, [name], is entitled to recover, without considering the fault percentages, is \$_____. (Enter this amount below as Total Damages.)

We, the Jury, now decide in favor of the Plaintiff and assess damages against the Defendant, [name] as follows:

Total Damages _____
Defendant’s percentage of fault _____ x _____ %
Plaintiff’s Verdict Amount _____ = _____

We further specify that the amount of damages to be awarded to [name of personal representative], in [his][her][its] capacity as personal representative of [decedent]’s estate, and [names of nondependent parents or children] are as follows:

[name of personal representative]	\$_____	(only for reasonable medical, hospital, funeral, and burial expenses, and the cost of administering decedent’s estate)
[name of nondependent parent]	\$_____	(which includes \$_____ for loss of love and companionship)
[name of nondependent child]	\$_____	(which includes \$_____ for loss of love and companionship)
TOTAL	\$_____	

(The TOTAL above must equal the Plaintiff’s Verdict Amount.)

Date Presiding Juror

5049

Wrongful Death—Unmarried Adult Person with Nondependent Parents or Children—Common Law Negligence

[Caption]

VERDICT FOR PLAINTIFF

We, the Jury, decide in favor of the Plaintiff [name], and against the Defendant, [name]. We further specify that the amount of damages to be awarded to [name of personal representative], in [his][her][its] capacity as personal representative of [decedent]’s estate, and [names of nondependent parents or children] are as follows:

[name of personal representative]	\$_____	(only for reasonable medical, hospital, funeral, and burial expenses, and the cost of administering decedent’s estate)
[name of nondependent parent]	\$_____	(which includes \$_____ for loss of love and companionship)
[name of nondependent child]	\$_____	(which includes \$_____ for loss of love and companionship)
TOTAL	\$_____	

Date

Presiding Juror

E. Loss of Chance

5051(A) Loss of Chance

VERDICT FOR DEFENDANT

We, the Jury, decide in favor of the Defendant, [name], and against the Plaintiff, [name].

Date

Presiding Juror

Comments

Verdict Forms 5051(A),(B), and (C) should be used along with Instruction No. 1555.

5051(B) Loss of Chance—Ultimate Harm is Death

VERDICT FOR PLAINTIFF

We, the Jury, decide in favor of the Plaintiff [name], and against the Defendant, [name], and we find the following:

[Plaintiff]'s chance of survival before [Defendant]'s _____%
medical negligence
- [Plaintiff]'s chance of survival after [Defendant]'s _____%
medical negligence
= (1) minus (2) equals ([Plaintiff]'s) Lost Chance of _____%
Survival)

We further specify that the amount of damages to be awarded to [name of personal representative], in [his][her][its] capacity as personal representative of [decedent]'s estate, and [names of surviving dependent children, surviving spouse, and surviving dependent next of kin] are as follows:

[name of personal representative] \$_____ (only for reasonable medical, hospital, funeral, and burial expenses, and the cost of administering decedent's estate)
+ [names of surviving dependent children, surviving spouse, and surviving dependent next of kin] \$_____
Total damages \$_____
x Lost chance of survival _____%
= Plaintiff's verdict amount \$_____

Date _____ Presiding Juror _____

Comments

Verdict Forms 5051(A), (B), and (C) should be used along with Instruction No. 1555.

5051(C) Loss of Chance—Ultimate Harm is Not Death

VERDICT FOR PLAINTIFF

We, the Jury, decide in favor of the Plaintiff, [name], and against the Defendant, [name], and we find the following:

	[Plaintiff]’s chance of [specific harm] after the medical negligence	_____ %
—	[Plaintiff]’s chance of [specific harm] before the medical negligence	_____ %
=	(1) minus (2) equals (3)	_____ %

We further find that the amount of damages to be awarded to [Plaintiff] are as follows:

	Total Damages	\$_____
x	Insert percentage from (3)	_____ %
=	Plaintiff’s verdict amount	\$_____

Date

Presiding Juror

Comments

Verdict Forms 5051(A), (B), and (C) should be used along with Instruction No. 1555.

APPENDIX OF REMOVED INSTRUCTIONS

Former Pattern Instr. No. 1.15 (Final Preliminary Instruction)

The court has read these preliminary instructions to you prior to the opening statements of the attorneys and prior to the introduction of the evidence so that you may understand the issues presented and the rules regarding the burden of proof, the credibility of witnesses, and the weighing of evidence.

You will receive further instructions after you have heard all the evidence and final arguments.

Comments on Removal

The Committee determined that the language of this Instruction is adequately covered by other instructions. *See, e.g., Series 100.*

Former Pattern Instr. No. 3.09 (Impeachment of Witness—Proof of Bad Reputation for Truth and Veracity or for Bad Moral Character)

The Committee recommends that no instruction on this subject be given.

Comments on Removal

Proof of bad reputation for truth or bad moral character is collateral to the main issue of the trial, and discussion on the topic is probably best supplied by arguments of counsel. In addition, the instruction singles out (and thereby places undue emphasis on) a particular item of the evidence. The credibility of witnesses is covered in other instructions.

Former Pattern Instr. No. 5.37 (Mere Accident)

It is reversible error to give a “mere accident” or “unavoidable accident” instruction in either traditional negligence actions or suits involving comparative fault claims.

Comments on Removal

It is reversible error to give an instruction stating that a defendant to a negligence suit is not liable for a plaintiff's damages if those damages are the result of an accident. *Kostidis v. Gen. Cinema Corp.*, 754 N.E.2d 563 (Ind. Ct. App. 2001); *see also Weinand v. Johnson*, 622 N.E.2d 1321, 1323 (Ind. Ct. App. 1993); *Miller v. Alvey*, 246 Ind. 560, 207 N.E.2d 633 (1965). The reason for the error is that such an instruction is incompatible with modern principles of tort law, under which a person is liable for damages proximately caused by the failure to exercise reasonable care. *Kostidis*, 754 N.E.2d at 572.

Such instructions require reversal regardless of whether the terms “mere,” “pure,” or “unavoidable” are used to modify the term “accident,” because the word “accident” is inclusive and self-defining. *Kostidis*, 754 N.E.2d at 572. In fact, a jury instruction can be fatally defective without even using the word “accident,” so long as the jury was advised that there is no liability for damages resulting from some kind of fortuitous event. *Indianapolis Ath. Club, Inc. v. Alco Std. Corp.*, 709 N.E.2d 1070 (Ind. Ct. App. 1999). On the other hand, an instruction is not necessarily erroneous just because it uses the term “accident,” so long as it addresses the burden of proof and proximate causation. *Kostidis*, 754 N.E.2d at 572. When determining whether a particular charge is a prohibited “mere accident” instruction, the focus is on whether the jury is likely to be misled by the use of the word “accident” or by similar language. *Kostidis*, 754 N.E.2d at 572.

**Former Pattern Instr. No. 5.43 (Assumption of
Risk—Employer—Employee—Ordinary and
Extraordinary Risks in General)**

An employee assumes all risks ordinarily incident to the discharge of [his] [her] duties, arising from known defects or dangers. Determining whether the plaintiff has assumed the risk of injury requires a subjective analysis focusing upon:

- (1) The plaintiff's actual knowledge and appreciation of the specific risk, and
- (2) The plaintiff's voluntary acceptance of that risk.

Comments on Removal

The Committee determined that the language of this Instruction is adequately covered by other instructions. *See, e.g.*, Instruction Nos. 921 and 1127.

Former Pattern Instr. No. 7.32 (Duty to Provide Product Reasonably Safe for Its Intended Use)

A manufacturer is under a duty to provide a product that is reasonably safe for its intended use.

Comments on Removal

The Committee determined that the language of this Instruction is adequately covered by other instructions. *See, e.g.,* Instruction Nos. 2103, 2107.

Former Pattern Instr. No. 7.33 (No Duty to Produce Accident Proof Products)

A manufacturer has a duty to produce [design][build] a product that is reasonably fit and safe for its intended purpose. However, a manufacturer has no duty to produce [design][build] an accident-proof product.

Comments on Removal

It is reversible error to give an instruction stating that a defendant to a negligence suit is not liable for a plaintiff's damages if those damages are the result of an accident. *Kostidis v. Gen. Cinema Corp.*, 754 N.E.2d 563 (Ind. Ct. App. 2001); *see also Weinand v. Johnson*, 622 N.E.2d 1321, 1323 (Ind. Ct. App. 1993); *Miller v. Alvey*, 246 Ind. 560, 207 N.E.2d 633 (1965). The reason for the error is that such an instruction is incompatible with modern principles of tort law, under which a person is liable for damages proximately caused by the failure to exercise reasonable care. *Kostidis*, 754 N.E.2d at 572.

Such instructions require reversal regardless of whether the terms "mere," "pure," or "unavoidable" are used to modify the term "accident," because the word "accident" is inclusive and self-defining. *Kostidis*, 754 N.E.2d at 572. In fact, a jury instruction can be fatally defective without even using the word "accident," so long as the jury was advised that there is no liability for damages resulting from some kind of fortuitous event. *Indianapolis Ath. Club, Inc. v. Alco Std. Corp.*, 709 N.E.2d 1070 (Ind. Ct. App. 1999). On the other hand, an instruction is not necessarily erroneous just because it uses the term "accident," so long as it addresses the burden of proof and proximate causation. *Kostidis*, 754 N.E.2d at 572. When determining whether a particular charge is a prohibited "mere accident" instruction, the focus is on whether the jury is likely to be misled by the use of the word "accident" or by similar language. *Kostidis*, 754 N.E.2d at 572.

While a jury instruction on accident-proof products may not be reversible error, the Court of Appeals recommended that such jury instructions not be used in future cases. *Indianapolis Ath. Club Inc.*, 709 N.E.2d at 1076; *see also Kostidis*, 754 N.E.2d at 573-74.

Former Pattern Instr. No. 7.35(B) (Liability for Hidden Defects)

A manufacturer is liable to a user or consumer of a product if:

- (1) The danger(s) is/are not open and obvious; and
- (2) The manufacturer knows or should have known of the danger; and
- (3) The manufacturer has failed to warn of the danger.

Comments on Removal

The Committee determined that the language of this Instruction is adequately covered by other instructions. *See, e.g.*, Instruction No. 2133.

Former Pattern Instr. No. 7.36 (Seller Holding Self Out as Manufacturer)

A seller who claims to be the manufacturer of a product and so labels the product is held to the same standard of care as the manufacturer.

Comments on Removal

The former pattern instruction applied only to cases arising before July 1, 1995.

Former Pattern Instr. No. 7.38 (Duty to Inspect for Dangers)

The Committee has not included a pattern instruction on the duty to inspect for dangers.

Comments on Removal

The Committee determined that the language of this Instruction is adequately covered by other instructions. *See, e.g.,* Instruction No. 2133.

Former Pattern Instr. No. 7.39 (Duty of Care in Providing Products for Doing Work)

When a party to a contract provides a product for use by the other party, that party must exercise reasonable care to ensure the product furnished to the other contracting party is reasonably safe for the purpose for which it is provided.

Comments on Removal

In a future edition of the Model Instructions, the Committee intends to supply an instruction based on the Restatement 2d Torts to replace this Instruction.

Former Pattern Instr. No. 9.07 (Counterclaim)

Because there is a counterclaim in this case, you may reach one of four results:

You may find for the plaintiff on the plaintiff's complaint and against the defendant on the defendant's counterclaim; or

You may find for the defendant on the defendant's counterclaim and against the plaintiff on the plaintiff's complaint; or

You may find against the plaintiff on the plaintiff's complaint and against the defendant on the defendant's counterclaim; or

You may find for the plaintiff on the plaintiff's complaint and for the defendant on the defendant's counterclaim.

In order for the plaintiff to recover on [her][his][its] complaint, [she][he][it] has the burden of proving each of the following propositions:

[Here set out the essential elements of proof required under the complaint, following the format of Instruction No. 9.03]

If after considering all of the evidence you find that the plaintiff has proved these propositions, then your verdict should be for the plaintiff on the plaintiff's complaint. However, if after considering all of the evidence you find that the plaintiff has not proved any one of these propositions, then your verdict should be for the defendant on the plaintiff's complaint.

In order for the defendant to recover on the counterclaim, the defendant has the burden of proving each of the following propositions:

[Here set out essential elements of proof required under the counterclaim, following the format of Instruction No. 9.03]

If after considering all of the evidence you find that the defendant has proved these propositions, then your verdict should be for the defendant on defendant's counterclaim. However, if after considering all of the evidence you find that the defendant has not proved any one of these propositions, then your verdict should be for the plaintiff on defendant's counterclaim.

Comments on Removal

If an explanation of the relevance of other types of pleadings is necessary, the Committee recommends modifying the model instructions on the issues for trial and elements.

**Former Pattern Instr. No. 9.09 (Cross-Complaint—Third-Party
Complaint—Multiple Parties)**

The Committee has not attempted to draft an instruction here because the factual situation in multiple-party suits can be so varied and the legal relationship of the parties so involved. In a multiple-party suit, it is recommended that the instruction on burden of proof on the issues be drawn following the format of Instruction Nos. 9.03 and 9.07.

Comments on Removal

If an explanation of the relevance of other types of pleadings is necessary, the Committee recommends modifying the model instructions on the issues for trial and elements.

Former Pattern Instr. No. 11.02 (Comparative Fault—Injury to Person or Property)

If you find from a preponderance of all the evidence that the defendant(s) is [are] liable to the plaintiff and that the plaintiff has suffered damages, you must decide the total amount of money that would fairly compensate the plaintiff for each proven element of damage.

In deciding these damages, you may consider the following elements:

[Here insert the proper elements of damage.]

You should decide the total amount of damages without regard to whether the plaintiff or a nonparty other than the defendant(s) was at fault in causing the damages claimed.

Your decision must be based on the evidence relating to damages and not on guess or speculation.

Comments on Removal

The Committee determined that the language of this Instruction is adequately covered by other instructions. For the burden of proof applicable to each substantive area, *see* the series on each topic. For the elements of damages, *see* Series 700.

Former Pattern Instr. No. 11.50 (To Plaintiff for Spouse's or Child's Medical Expenses)

The necessary and reasonable expenses incurred by [*name plaintiff*] for medical care and treatment for [the spouse][the child] [and for such reasonable and necessary expense as required in the future.]

Comments on Removal

Generally, a spouse or child who survives an injury should have his or her own cause of action, and would therefore be a plaintiff, so that the other elements of damages instructions would adequately cover the subject of this removed instruction.

Former Pattern Instr. No. 13.11 (Counterclaim)

[Name Counterclaimant] has filed a counterclaim in which the parties are named counterclaimant and counterdefendant. The parties named stand in the same relation one to another as do a plaintiff and a defendant under a complaint. Therefore, as the instructions given you apply to the plaintiff and defendant under the complaint, so they also apply to the counterclaimant and counterdefendant under the counterclaim.

Comments on Removal

If an explanation of the relevance of other types of pleadings is necessary, the Committee recommends modifying the model instructions on the issues for trial and elements.

Former Pattern Instr. No. 13.13 (Loss of Consortium)

A claim for loss of consortium is based upon the alleged injury to _____, [the consortium plaintiff's spouse]. The claim is derived from the action filed by the plaintiff, _____. For that reason, [if you find in favor of the defendant upon the claim of the plaintiff, your verdict must also be for the defendant concerning the claims of _____, the consortium plaintiff] [if you find fault on the part of the defendant, you must apply the same percentages of fault to the consortium plaintiff's claim as you apply to the plaintiff's claims].

Comments on Removal

The Committee determined that the language of this Instruction is adequately covered by other instructions. *See, e.g.*, Instruction No. 705.

Former Pattern Instr. No. 13.15 (Loss of Consortium—Elements—Burden of Proof)

To establish the claim of consortium, [*the consortium plaintiff*] has the burden of proving the following elements:

- (1) That the defendant is liable to _____ [*the plaintiff*];
- (2) That _____ [*the consortium plaintiff*] suffered damages or loss because of the injury to _____ [*the plaintiff*]; and
- (3) That the defendant's negligence to _____ [*the plaintiff*] was the proximate cause of any damages or loss sustained by _____ [*the consortium plaintiff*].

Comments on Removal

The Committee determined that the language of this Instruction is adequately covered by other instructions. *See, e.g.*, Instruction No. 705.

Former Pattern Instr. No. 19.05 (Pedestrian, Motorist—Statutory Violations)

[For Pedestrian, Motorist—Statutory Violations, the use of Instruction No. 17.01 is recommended.]

Comments on Removal

The Committee recommends using a general instruction on statutory violations. See Instruction Nos. 327, 937, and 1139.

Former Pattern Instr. No. 19.41 (Duty of Driver Crossing Tracks)

[It is recommended that no general instruction be given relative to the duty of a motor vehicle operator at a railroad crossing.]

Comments on Removal

The Committee recommends using a general instruction on statutory violations. *See* Instruction Nos. 327, 937, and 1139.

Former Pattern Instr. No. 19.43 (Speed—Trains)

[If a statute or local ordinance governs the speed of trains, it is recommended that a variation of Instruction No. 17.01 be used.]

Comments on Removal

The Committee recommends using a general instruction on statutory violations. *See* Instruction Nos. 327, 937, and 1139.

Former Pattern Instr. No. 19.45 (Statutory Violation—Duty to Signal)

[For an instruction on this subject, the use of Instruction No. 17.01 is recommended.]

Comments on Removal

The Committee recommends using a general instruction on statutory violations. *See* Instruction Nos. 327, 937, and 1139.

Former Pattern Instr. No. 21.57 (Statutory Violations)

For violations of animal statutes, the use of Instruction No. 17.01 is recommended.

Comments on Removal

The Committee recommends using a general instruction on statutory violations. See Instruction Nos. 327, 937, and 1139.

Former Pattern Instr. No. 23.04 (Implied Warranty of Capacity and Ability)

Unless stated or agreed otherwise, a [health care provider] treating a patient has a duty to use that degree of care and skill ordinarily possessed by other [health care providers] practicing in the same field.

Comments on Removal

The Committee declined to approve an instruction providing that a health care provider can enter into a contract that absolves the provider of using reasonable care.

Former Pattern Instr. No. 23.35 (Implied Warranty of Capacity and Ability)

Unless stated or otherwise agreed, an attorney representing a client has a duty to use that degree of knowledge and skill ordinarily possessed by other attorneys practicing in the same field.

If an attorney exercises sound judgment and uses ordinary care and skill in representing a client, then the attorney is not responsible for the outcome.

Comments on Removal

The Committee declined to approve an instruction providing that an attorney can enter into a contract that absolves the attorney of using reasonable care.

Former Pattern Instr. No. 29.23 (Damages—Direct and Certain—Not Remote)

The damages awarded must be based on the evidence and may not be based on guess or speculation.

Comments on Removal

The Committee determined that the language of this Instruction is adequately covered by other instructions. *See, e.g.*, Instruction No. 701.

Former Pattern Instr. No. 29.25 (Damages—Jury to Determine)

In determining the value of the property taken and other damages, if any, you are not required to accept the opinion of any particular witness. You should arrive at your decision only after carefully considering all the evidence.

Comments on Removal

The Committee determined that the language of this Instruction is adequately covered by other instructions. *See, e.g.*, Instruction No. 115.

Former Pattern Instr. No. 34.03 (Laches)

“Laches” is an undue delay of time in asserting a legal right. If the defendant proves by a preponderance of the evidence that plaintiff unreasonably delayed in seeking requested relief, and that the defendant has been prejudiced by the delay, you may find that plaintiff’s request for relief should be denied.

Comments on Removal

Laches is generally an equitable doctrine that is rarely, if ever, put to a jury.

Former Pattern Instr. No. 37.01 (General for Verdict)

The Court is submitting to you forms of possible verdict[s].

When you have reached your verdict, the foreperson should complete, sign and date the verdict form. Bring all verdict forms with you when you return to court.

The forms of the verdicts are:

[Here insert the possible verdicts that the jury may return.]

Comments on Removal

The Committee determined that the language of this Instruction is adequately covered by other instructions. *See, e.g.,* Instruction No. 545.

Former Pattern Instr. No. 37.27 (Replevin—Verdict for Plaintiff)

We, the Jury, find the Plaintiff, _____, is [the owner and] entitled to possession of the following described property: [*here describe the property to which Plaintiff is entitled*], and the Defendant, _____, unlawfully took and detained the same. We further find the property has a value of \$_____.

In addition to the Plaintiff's entitlement to possession of the property described above, we find Plaintiff's damages are \$_____.

Date Foreperson

Comments on Removal

The Committee omitted this Instruction because it is very rarely used.

Former Pattern Instr. No. 37.31

(Replevin—Part of Property for Plaintiff and Part for Defendant)

We, the Jury, find the Plaintiff, _____, is [the owner and] entitled to possession of the following described property, [*here describe the part to which Plaintiff is entitled*], and the Defendant, _____, unlawfully took and detained this property. We further find this property has a value of \$_____.

In addition to the Plaintiff's entitlement to possession of the property described, we find the Plaintiff's damages are \$_____.

We, the Jury, further find the Defendant, _____, is [the owner and] entitled to possession of the following described property, [*here describe the part to which Defendant is entitled*], and the Defendant did not unlawfully take or detain this property. We further find this property has a value of \$_____.

DateForeperson

Comments on Removal

The Committee omitted this Instruction because it is very rarely used.

Former Pattern Instr. No. 37.33 (Ejectment—Possession and Damages)

We, the Jury, find the Plaintiff, _____, is entitled to possession of the premises described in the complaint [*or*, described as follows, (*description*)].

We further find the Plaintiff's damages are \$_____.

DateForeperson

Comments on Removal

The Committee omitted this Instruction because it is very rarely used.

Former Pattern Instr. No. 37.35

(Ejectment—Damages Only After Expiration of Possessory Right)

We, the Jury, find the Plaintiff, _____, was entitled to possession of the premises described in the complaint on [*insert date when this case was filed*], but such right expired on the _____ day of _____, 20 _____.

We further find the Plaintiff's damages are \$_____.

Date

Foreperson

Comments on Removal

The Committee omitted this Instruction because it is very rarely used.

Former Pattern Instr. No. 37.39 (Partition—Verdict for Plaintiff and Defendants)

We, the Jury, find the Plaintiff, _____, is entitled to partition of the real estate described in the complaint and is the owner of an undivided _____ [*insert fraction or percentage*] interest; the Defendant, _____, is the owner of an undivided _____ [*insert fraction or percentage*] interest; and the Defendant, _____, is the owner of an undivided _____ [*insert fraction or percentage*] interest.

Date Foreperson

Comments on Removal

The Committee omitted this Instruction because it is very rarely used.

Former Pattern Instr. No. 37.41 (Partition—Verdict for Defendants)

We, the Jury, find the Plaintiff[s], _____, is [are] not entitled to a partition of the real estate described in the complaint.

Date Foreperson

Comments on Removal

The Committee omitted this Instruction because it is very rarely used.

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